

The Law of Administrative contracts

Teaching Material

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Unit I

Administrative Contracts in General

Introduction

This unit is intended to acquaint students with the nature generally of and the formation and object of administrative contracts. Administrative contracts are very much important in ETHIOPIA under current settings .some people say it is bad to have too much interference in the private sphere in the era of privatization. The government should regulate the market being another argument. Leaving aside the literary arguments, legally Ethiopia has devoted one title in its civil code to specifically deal with administrative contracts. In addition to this, we have procurement proclamation to enable equitable, efficient and effective procurement. In this section, we will have something to say on Ethiopian administrative contract.

Specific Objectives

At the end of the unit students will be able to

define administrative contracts

- form administrative contracts.
- distinguish administrative contracts from other types of contracts.
- understand the views the two prominent legal systems have towards administrative contracts
- Know the historical setting of administrative contracts.

1.1 Brief Genesis of Administrative Contracts

Though hard to locate the exact time, one can still validly locate philosophical and economic backgrounds of administrative contracts.

Back in the days of Adam Smith who preached the laissez faire argument with the effect of diametrically insulating the state from the market, the role of the state was exponentially limited to enabling the state to undertake only its “traditional” functions.

As per Adam Smith, the state was advised to let the market alone. The state should put its hands off the market but without forgetting to create internal peace and order, facilitating the market by formulating a peaceful environment and without directly intervening in the market. To this end, the state should establish institutions like the police, courts and parliaments. Such an impact on the economy as caused by leaving the market alone however would not outlive such a condition as the Great Depression. The Great Depression proved the fact that markets cannot operate by their forces alone-rather to some extent the state should regulate the market. Next generation political economists devised the WELFARE state where we have a state which regulates the market-that provides public services such as education ,health, transport, water, light ,sanitation, recreation etc.

Thus, apart from its traditional functions, the state was also conferred with those additional functions listed above. Basically the state used to institutionalize its coercive force to carry out its protection function. But with the growth in the type and nature of functions and because the appropriate way of attaining goals as the case may be is entering into contract. Either by its coercive force or its right to enter in to contract the state strives to carry out its ever growing functions.

To this end of utilizing its contracting capacity, government enters into a special type of contract called administrative contract. Note that it is from this background, apart from other things, that administrative contracts derive their peculiar feature.

1.2 Administrative Contracts and Other Forms of Contracts: General Overview

Because of the need to carry out its functions, government, via its branches, will embark upon different activities which inevitably will invite the interplay of its branches and the private sector. These branches other wise known as administrative agencies assist government to properly take its tasks of service provision among other things. It is therefore while these agencies carry out their functions that they use the law of administrative contracts to their ends. The ends are public services, the means administrative contracts.

If this is so, administrative contracts are contracts under the strict sense of the law but only an” administrative” one (see for example Art. 1676(2) cum Art.1675 of Ethiopian civil code with Art.3131 of the same).

But this nature of the contract i.e. being an administrative contract makes the same different from the beginning to the end from other types of contracts that we know.

Our inquiry therefore will be what is there in administrative contracts? What grain of difference does the qualification administrative add over non-qualified contracts?

One basic addition by the qualification is associated with prerogative matters. Because administrative agencies favorably enjoy the presumption of acting on behalf of the public and because public interest is overriding enough to put aside even basic principles of the law the agencies will enter into an arrangement where the platform is squarely fitted to their play than to the other contracting party.

When talking about administrative contracts, hence, one is talking about a contract where the two parties are unequal. Being a contract between unequal parties from the onset, at the end of the day, it will end up entitling parties in unequal manner.

If this is so, how should we define administrative contracts? Well as noted earlier the general contract title of the civil code is applicable to this case because of Articles 1676, 3131 and Art. 1675.

Definition

Art.1675

“A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature”. Administrative contracts do share all of the above elements. The differences, however, extend beyond the requirements of Art. 1675 far in to the requirements of Art.3132 which partly reads as: “A contract shall be deemed to be an administrative contract where”

- a. It is expressly qualified as such by the law or by the parties; or
- b. It is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service.

Let us examine the elements of Art.3132:“**Expressly qualified as such by the law or the parties**”

According to this expression, a contract (remember Art.1675) will be an administrative contract if the law expressly qualifies it as an administrative contract. To this end, the law clearly enumerates what can be considered as administrative contract. But what if the

law expressly disqualifies a contract to be an administrative contract? Both instances are the experiences of Ethiopia. Let us begin with the first. In the civil code we have such articles as Article 3207 and 3244 which expressly qualify contracts as administrative contracts.

As to the second instance, we have the Mining Proclamation No.52/1993 which disqualifies contracts concluded by the administrative authorities with other parties under Art. 55(2).

The second implication of Art.3132 (1) is that parties may qualify expressly a contract as an administrative contract. An issue worth raising at this juncture will be ‘are all contracts administrative contracts merely because they are qualified as such by the parties?’ Among other things, a contract qualified as such by the parties on face value cannot be considered as an administrative contract unless one of the parties is an administrative authority.

For one other reason to be consequently discussed i.e. for content consideration a contract merely qualified as an administrative contract by the parties will not also be an administrative contract. What about a contract that involves an administrative authority but not qualified as such by the parties? Stated otherwise are all contracts that make one of the parties an administrative authority administrative contracts? René David says

As a French legal scholar and as I think it fit, in our classification of law, public law should be distinguished from private law. Especially it is important to separate civil law from administrative law...contracts made by public officials have this [special trait] which enable us call them administrative contracts and treat them separately from civil law.[emphasis]

This, as it may, the civil code proceeds to say-“ ... **Connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service**”

The previous element is more or less concerned with the form of the contract, meaning the name the parties give to their contract when they first form it. The form it takes confers the contract a special nature.

Here we are concerned with the content of the contract, that is its object which determines the nature of the contract. Based on the object and the manner of meeting their object together with the type of the parties and their manner of participation in executing the object of the contract, we have another mechanism of distinguishing administrative contracts from ordinary contracts.

The object: this is one of the ways which is helpful to distinguish administrative contracts from the rest of **the** contracts. Art. 3207 (1) identifies one of the objects as an activity of a public service”. In turn we have to consider what a public service is in our law.

Public service

Any activity which a public community has decided to perform for the reason that it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service.

According to Art 3207(1) two reasons make “any activity” a “public service” without which the activity cannot be considered so. What are these reasons? One of these reasons is necessity. This necessity should

be the need of the general interest. So any thing necessary and considered as such by a public community to the general interest will fulfill the first requirement of Art. 3207(1). The second reason is inadequacy on the part of the private sector. Thus a public service is any activity but which private individuals on their initiative cannot carry out among other things because of financial constraints.

Thus only a contract that has made its object “an activity of the public service...” will have the chance to qualify as an administrative contract. Next to this, the manner of participation on the part of the contractor determines the nature of the contract. As such a contract to be an administrative contract should imply a permanent participation of the contractor... in the execution of such service. Let us in turn see what permanent participation is.

Permanent participation

Does permanent under Art. 3132(b) imply bondage? How long should a contract last?

Letting a contract to last forever jeopardizes the basic rights of an individual. Contracts should not be servitudes. Our first consideration therefore should be the individual. Thus we are saying that permanent participation of Art. 3132(b) must not imply the indefinite and forever nature of the relationship. Further “permanent” should imply continuous, uninterrupted, regular and normal participation of the contractor in the relationship and the expansion of a public service.

One other issue worth mentioning is the implication the “or” conjunctive has under Art. 3132(1) & (b). Does the conjunctive make the requirements optional or should we expect the cumulative applications of sub-articles (a) & (b)?

To elucidate, if we are to make the requirements under Art. 3132 optional then we are saying that mere qualification of a contract as an administrative contract will make the same an administrative contract. Sticking to the second extreme will however force us to consider all the elements under Art. 3132 and their affirmative existence to say a contract and administrative contract. Which one position do you think is reasonable? Why?

No less important is the difference between “administrative agencies” and “public enterprises”. We say this is important because the law prescribes in addition the nature of one of the parties to an administrative contract .As observed above, the law says one of the parties to an administrative contract should be an administrative authority. But what is an administrative authority? Does it also mean public enterprise? Consider Art 2(f) of Proclamation No.430/2005- “Procuring entity means public body, which is partly or wholly financed by Federal Government budget, higher education institutions and public institutions of like nature”.

From this it is possible to infer that at least two things make an entity an administrative body. The first is the source of income of the entity. If the entity partly or wholly derives its income from the government, there is a possibility to consider it a public body which can enter into administrative contracts. On the other hand the purpose of the organ makes it an administrative body.

Comparison: Genre and View Comparison

Here our basic concern will be comparing and contrasting administrative contracts and other types of contracts on one hand, and the common law and civil law on the other hand.

Administrative contracts are similar to other types of contracts because of their formation, validity requirements and the form. On the other

hand, administrative contracts are different from other contracts because of their formation, content and execution.

Let us briefly explain the points- But first what do you think are the views of the two legal systems towards administrative contracts?

The common law views administrative contracts just like other ordinary contracts whose consequences will show up to be the treatment of parties as equal members to the venture. No party will enjoy priority. Both are equal parties to and in the case. As a consequent incidence, the common law requires no new or special law governing administrative contracts. There is only one contract law regime that governs all the instances.

These outlooks will naturally lead to the adjudication of cases that involve administrative contracts by the ordinary courts of law.

Perspective change is observable under the civil law system where parties to administrative contracts are unequal, whose case will be governed by a special regime and adjudicated by special tribunals (i.e. administrative tribunals). This is specially the case in France.

1.3 Formation of Administrative Contracts.

Legally the life of a contract begins at its formation after parties have consented to be bound by it, if parties have the capacity to legally express their consent and if the object of their contract is succinctly defined, plausible and lawful. [Art. 1678]

Short of this, the law either declares the contracts void or puts the possibility of voidability as the case may be.

Normally the requirements under Art. 1678 are those which determine the viability of any contract. Under this very normal condition, exceptional situations are envisaged with regard to formality

requirements. In addition to consent and object requirements, the law also shows the possibility of agreeing in favor of a given form or a form by the normal operations of the law [art.1678 (a) and Art. 1719 by virtue of Art. 1676]. Thus, the law either prescribes adherence to a certain form (Arts. 1724 & 1725), or parties may agree to make their contracts in a written form. Art.1724 makes mandatory that contracts with administrative authorities be made following a written form. Any contract to which a government agency is a party, including any type of employment contract, should be made in writing. In public administration, officials do not stay in office indefinitely rather they may leave their office by election, removal or resignation. Once they leave their office it is difficult to ascertain the content of the contract entered into during their stay in office but that continues to be effective even after they leave their office. Moreover, oral contract opens a room for corruption since keeping information is difficult.

As was noted before, Art. 1676 warrants the use of Title XII on contracts in General by explicitly stating “... regardless of the nature thereof and the parties there to.” Because of this, Art. 1678 and consequent provisions that govern the formation of a valid contract will also be valuable in our consideration. In addition, Articles 3140-3145 and 3134-3136 will be considered. By presuming that you have made an intelligible discussion on the General contracts aspect of the law, our concentration will be on the special part of the law that governs administrative contracts proper. Let us consider the validity requirements.

1.3.1 Validity Requirements

Consent

There is in general no better evidence of the justice of an arrangement than the fact that all persons whose interests are affected by it have freely and with full knowledge consented to it. In the famous maxim of Hobbes “there is not ordinarily a greater sign of the equal distribution of any thing than that every man is contented with his share”.

Consent is evidential of a right and constitutive of the same. Because of this philosophy therefore we give a paramount place to consent. Short of consent no evidence and no right.

These justifications can be gathered from Art. 1679 and Art. 1680, while the former talks about the constitutive nature of consent, the latter talks about the evidentiary role of the same. Read Art. 3134 and identify the role played by consent. What is the role?

Under Art. 3134, it is the contract concluded by the administrative agencies that proves the existence of consent. Meaning mere conclusion of a contract by an administrative body implies the existence of consent on the part of the administrative body. It partly reads
“..., the conclusion of a contract by the administrative authorities implies an express manifestation of will on their part”

Hence, we derive consent from the specific form that the contract follows. Because Art.1724 prescribes the making of an administrative contract in a written form, this is indicative of the existence of consent on the part of the administrative agencies.

As a formal and not simple agreement the law does not require the mere existence of consent but its manifestation in some particular form.

The law requires therefore proving consent as expressed by the parties. What can be counted as special under administrative contracts however may be the insufficiency of implied consent. Ordinary contracts envisage

the possibility of deriving consent from silence under exceptional circumstances. On the part of administrative contacts always one has to prove the existence of express consent. Nowhere therefore silence does amount to acceptance. To be specific, Art.3134 (2) says *“Where an authority competent to approve a contract keeps silent, such silence shall not, in the absence of a formal provision, be deemed to amount to approval.”*

Capacity

Administrative contracts are made by artificial persons be it the administrative agency or the contractor which is usually a business organization.

Capacity, under such circumstances, means a different thing. It cannot be about a mental state nor can it be about chronology. Rather, capacity is all about establishment, registration or license.

Generally, capacity is either legal or technical. Let us begin with the contractor.

Basically any juridical or physical person that wants to conclude a contract with administrative agencies should have:

- A. Technical and professional capacity
- B. Legal capacity
- C. Financial capacity
- D. Fiscal capacity

What about administrative authorities? What capacity should they have?

- a. The administrative agency should have legal personality which means it should be established through a proclamation or regulation.
- b. Next to this validity question and after its positive determination the agency should possess the capacity to enter into contracts

.Such capacity may emanate from law or practice (i.e. specific activities or functions). Sometimes capacity may also emanate from authorization. Authorization might be a single venture or still a sort of double standard effectuated in a cumulative modicum with other prerequisites.

- c. An administrative agency is still duty bound to assert its financial capacity. To this end “procuring entities shall be responsible for certifying the availability of funds to support the procurement activity before signing a contract “(Art.7(1) (e) of Proclamation No.430/2005)

Here it is worth raising two questions. The first is, “Does lack of credit have a consequence of invalidating administrative contract?” the second is Can such an act be counted as ultra vires?

To address these questions, it is good to consider articles 3142 & 401 of the civil code and Art.7 (1) (c) of the proclamation. In a crystal clear phraseology, Art. 3142 validates an administrative contract formulated regardless of credit requirement. To be specific, acontract concluded by an administrative authority shall be valid not with standing that such authority has not received the necessary credits for the performance of the contract. On the other hand, Art. 401(1) tries to expose what an ultra vires constitutes. Thus,Acts performed by the bodies referred to in this chapter are in excess of the powers given to them by law or without the absence of the conditions or formalities required by law shall be of no effect.

Art 401 serves at least two purposes. Firstly it tries to tell us what ultra vires activities are. Next to this, it sanctions the activities by declaring them as nearly void.

At other times consent might not be this. Rather consent might be approval (Art. 3144) where by no consent is expected to be expressed until and unless "...such approval is given.

This is usually the case "where the conclusion of the contract is subjected to the necessity of a further approval..."

Object

The object of a valid contract should be lawful and possible next to being defined (determined). Art 1711 leaves the parties to freely determine the object of their contracts the extent of the freedom however being "the restrictions and prohibitions as are provided by law."

You can therefore infer from this that both parties involved in a contract have a say on the object of the contract. Art.1711 thus underscores the fact that object determination is not one way traffic. Peculiar however to administrative contracts, administrative agencies are entitled to formulate in advance model specification, general clauses and common directives (Art 3135) .Predominantly administrative contracts have objects determined by administrative agencies.

However, it is good to note the fact that the legal limit under Art. 1716 is applicable to objects determined by administrative contracts. Can you justify this assertion?

Next to insuring the participation of parties in determining the object of their contracts, the law also wants to maintain the integrity of the object on the face of the law. Though determined by anyone, still the object should be clearly stated in an understandable manner (Art.1714).

An administrative contract should also have a possible and lawful object. To a very large extent parties are free to agree together upon any matter

as they please. Limitations are however there-party in the interests of parties and partly on behalf of the public. There are instances where the law admits of no abatement and many in which it will admit of no addition by way of agreement.

Form

Under normal circumstances, compliance to formality requirements is not necessary. (Art.1678(c))

Never the less under those circumstances where the law prescribes, any one has to comply with the prescription. One instance of form prescribed by the law relates to any contract binding the Government or a public administration” under Art.1724)

The requirements of the law here are two. The contract should be made in writing and it should be registered. We can explain of the two fold purposes of the law.

- Designed as a pre-appointed evidence of the fact of consent and of its forms to the intent that this method of defining rights and liabilities may be provided with the safeguards of permanence, Certainty and publicity. Because a contract is law (Art.1731) and because some of the features of a good law with an “ internal morality” per Lon Fuller are permanence, determinacy and publicity writing down a contract caters” the law” these qualities. The quality of publicity conferred on contracts by following Art. 1724 does also serve the ends of Art12 of the FDRE constitution by manifesting the transparency theory.

Any necessary formality has the effect of drawing a sharp line between the preliminary negotiations and the actual agreement and so prevents the parties from drifting by inadvertence into unconsidered consent.

What is there in the document expresses the consent. One cannot later modify the consent as written by the one expressed orally.

On top of the prescription under Art 1724, some administrative contracts should be formed following procedures of tender. This will be discussed in depth in our consequent discussion of “modalities of formation.”

1.3.2 Modalities of Formation.

Administrative contracts should be concluded following the formality requirements that the law prescribes. Such a provision is available under the General contracts part of the law. This being the rule, some administrative contracts need additional modalities of formation. Accordingly, we have instances when administrative contracts are concluded following a procedure of tender.

As art 3147(1) makes it clear by utilizing “may be...” it is optional that such a procedure is followed. To show the possibility however the law reads “Administrative contracts (may be) concluded by the procedure of allocation by tender” (emphasis)

Once however we are channeled to make an administrative contract by the procedure of allocation by tender, we will act to the contrary i.e. fail short of allocating by tender, “... under pain of nullity.”

The natural questions will be “Why are we channeled as such And when are we channeled?”

To begin with the second, we are forced to conclude an administrative contract by allocation “... where never the law imposes such obligation”. Let us consider the full text of Art 3147(2). “(Administrative contracts)

shall be concluded by (the procedure of allocation by tender)..., whenever the law imposes such obligation.”

Hence once the law dictates us to conclude an administrative contract by the procedure of allocation by tender we have to do it in that way the consequence of not following the diction being nullity.

Among other things the law prescribes to meet the objectives of transparency and taking into account, the sensitivity of the obligation. Thus tender minimizes potential dealings between administrative officials and the other contracting party. And secondly because after all the contract is to be concluded to provide the best for the public, the procedure of tender aims at selecting the best contracting party in terms of reasonable price and modest quality.

By taking these rationales into account the law prescribes adherence to the procedure with the procedure under Art.3148-3169. To this end, administrative contracts that should be made by the procedure of allocation are governed by Articles 3148-3169.

If the contract is to be concluded after allocation, Art.3148 tells us that “the allocation shall be notified to the public in the manner prescribed by administrative regulations or in default... in the manner which appears the most appropriate”.

The law, in this case, is concerned not only with the publicity issue but even with the mechanism of attaining this publicity. The normal way of publicity is through electronic media and printing media. Sometimes administrative agencies will tell the public through electronic media to read and consider a given series of a newspaper usually to better comprehend with the content of the notice.

The minimum threshold of the content of the notice of allocation is available under Art. 3149 fashioned in a mandatory spirit but effectuates in an optional manner i.e. what happens if the notice fails to include one of the lists under Art.3149?

Though the law is silent on this issue, the publication of those issues under Art.3149 limits the prerogatives of administrative agencies from arbitrarily modifying the specifications. (See Art.3150 cum Art 3149) Mind you specifications can still be modified by a new publication (Art.3150). So, isn't this tantamount to saying "do not modify the old specification with a new one but only the new with a new one?"

One other issue worth noting is the status of this publication under Art. 3148. Should we consider it as an offer or as a declaration of intention? Note that an offer has a quite different legal consequence from a declaration of intention. See for example Art.1690 and 1687 on this issue.

After administrative agencies declare their intention by notifying the public about the allocation, "The contractors or suppliers who intend to present themselves as tenderers shall deposit in the place indicated and within the time specified by the specifications (a declaration of their intention) to tender and their tender." (Art.3153).

"The declaration of intention (offer) to tender shall indicate the name, first name, qualifications and address of the candidate." (Art.3154 (1))

"The [tender] shall contain an offer of the price and the undertakings of the candidate" [Art. 3155(1)]

The above provisions show us the need to comply with formality requirements on the event of declaring our intention. Because they are

about declaration of intention, we should not think of the formation of an administrative contract at this level. What else should we consider?

As to Art.3159, for example, “The office of allocations shall firstly take cognizance of the declarations of intention to tender.” To verify whether these have been regularly deposited and whether the tenderer fulfill the conditions required for admission to the allocation. “This verification is not to determine the successful tenderer. Rather it is to determine admission to the allocation”.

A provisional successful tenderer is the one who makes the “most advantageous tender for the administrative authorities (Art 3164 (1). Among other things the most advantageous tender is determined by the offered price. To this end Article 3164(2) reads “for this purpose, the office shall take into account the price offered and all the modalities of the tender in conformity with the specifications”.

Even the designation of a provisional successful tenderer does not imply the conclusion of an administrative contract.

For that matter the office (of allocation) need not designate any provisional successful tenderer where regulations of the allocation prescribe that the administrative authorities do not intend to negotiate beyond a certain price. (Art 3165(1)).

On the advent of approval, the contract shall be concluded. Art. 3168 says the successful tenderer will no more be qualified as a provisional but a permanent successful tenderer.

This being one aspect of forming administrative contracts as governed by the civil code, we have other modalities of forming administrative contracts under proclamation No 430/2005. We will briefly consider the procedures under this proclamation.

1.3.3 Process of Forming Administrative Contracts under the Proclamation

Under private contracts, parties have at every liberty to choose their would be contracting party. This being not the case under administrative contracts the manner of selecting the prospective contracting party will have in view such considerations as ensuring the economic and efficient use of public fund and making public procurement in a manner which is fair, transparent and non discriminatory (Preamble of Proclamation No.430/2005).

Administrative contracts, therefore, have this view in advance thereby limiting contracting parties' from freely picking up their prospective counter parts.

To begin with our discussion, it is good to first understand what procurement is per proclamation No 430/2005. Accordingly, "procurement" is to be understood as "the purchasing, hiring or obtaining by any other contractual means goods, works and services." [Art.2 (e) of the proclamation]

We should therefore understand procurement in a wider sense to include not only purchasing but also hiring and any other contractual means enabling the acquisition of goods, works and services.

If this is procurement, what are the means of procurement? The rule here is "open bidding". That is why Art. 25(1) prescribes "*[e]xcept as otherwise provided in this proclamation, the procuring entity shall [use] open bidding as the preferred procedure of procurement.*"

The otherwise provisions of the proclamation are enumerated under Art 25(2) of the same. Next to this, upon delimiting the scope of application of the proclamation, Art.3.(2) takes into account another consideration that authorizes the use of a different procedure of procurement. This is obviously true in purchase of goods, services or works that involves “national security or defense”. But should all procurements that involve the above entities be undertaken following a different procedure than open bidding?

At least six modalities of procurement including open bidding are recognized by the proclamation. These are available under Articles 25-30.

They are:

1. Open bidding
2. Restricted tendering
3. Direct procurement
4. Request for quotations
5. Two-staged bidding.
6. Request for proposals.

1. Open bidding:

This is the rule under the proclamation. The first thing that comes to mind when thinking of open bidding is advertisement. Art.31 (1) prescribes the modality of advertisement. Thus, “invitation to bid shall be advertised in at least one national newspaper of general circulation. Additionally, the procedures under articles 32-42 should be complied with.

Generally the bidding will be considered as open because it is advertised as such by allowing a great number of bidders to competitively participate. Briefly, there are five steps here:

- a. Preparation of bid (Art.33)

- b. Invitation for bid (Art.32)
- c. Advertisement (Art 31. Cum 35)
- d. Submission and receipt of bids (Art.37 cum Art 36)
- e. Opening of bids, examination & evaluation of bids (Arts 38-39)

2. Restricted tendering

This is possible after following the conditions under Art 26(1). When “the good, works or services... are available only from a limited number of suppliers” or when the time and cost of bidding is disproportionate to the value of the things to be procured, the mode of procurement will be restricted tendering.

The procedures to be followed under restricted tendering are those listed under open tendering except for the modifications introduced under Art.44. Some of them include:

- 1. Invitation to bid is addressed to the few who have already agreed to bid
- 2. Bid security is optional in the sense that it is the procuring entity which determines whether to pose the request or not.

Even though the number of people who participate in the bidding are less than those we already have in open bidding, non-discrimination and fairness are the rules of the game. Procuring entities are expected to render equal treatment to those who participate in the bidding. They should also provide equal opportunity to those in the suppliers list.

3. Direct Procurement:-

Generally speaking, the rule in the procurement proclamation is open bidding. However, under clearly enumerated cases direct procurement is envisaged as a possibility. Direct procurement in a way should not be

used to avoid possible competition among bidders nor should it be used to discriminate among them. Taking this as background, the proclamation enumerates the possible conditions that warrant the use of direct procurement as one means of procurement. Some of the conditions listed under Art.27 include:

1. Absence of competition because of technical reasons,
2. Provision of supplies for replacement, as extension for existing supplies or when procurement from another supplier forces the procuring entity to procure equipment or service not meeting requirements of interchangeability
3. When additional works which were not included in the initial contract have, through unforeseeable circumstances, become necessary since the separation of the additional works from the initial contract would be difficult for technical and economic reasons
4. Determination by the head of the procuring entity that the need is pressing and of emergency and delay will result in serious problem and injurious to the performance of the procuring entity

Do you have anything to say with regard to the list that we have under Art.27? Is the list exhaustive? Why? Why not?

1.4 Object of Administrative Contracts

Provisions of the law that govern the object of contracts in general require the parties to conclude a contract that has a possible, defined and lawful object. On top of that, Articles 3170 and 3171 deal with lack of object and unlawfulness of object. But within the realms of unlawfulness of object, Art. 3143 prescribes aggravated failures to comply with administrative laws or regulations that dictate about the

necessities of authorization. As to Art. 3143 such a contract concluded in the absence of an authorization shall be of no effect as if the object of the contract is unlawful. The assumption here is the agency is acting ultra vires.

Absence of Object

There is no mistake in holding to the effect that when an object (cause) is absent from a contract when the object is an impossible object in the first place. Thus if parties agree to do or to refrain to do a certain act which in reality is impossible the law considers such a contract as a contract without object. Absence manifests itself at least in two ways. An object might be absent from the beginning or the object of a contract may vanish in the course of time. Let us see Art. 3170.

A contract shall be null on the ground of lack of cause where, at the time when it is made, it makes it impossible to attain the result desired by the administrative authorities and known to the other contracting party.

Art.3170 views the object of the contract from the angle of the rationales of administrative contracts. Because administrative contracts are concluded aiming at serving the public, a public that cannot be properly served for reasons mentioned in our introduction if left in the hands of private individuals. Thus the object of administrative contracts should be purposive. And this purpose is all about serving the public via administrative contracts. Accordingly,” ... the result desired by the administrative authorities...” thereof is this issue of purposive ness”

Hence if an administrative contract “makes it impossible to attain the result desired...” then the contract will be considered as lacking cause. Now read Art. 3170 again and consider the above discussion.

Unlawfulness of Object

As mentioned earlier an object of any contract should be possible as it should also be lawful. Art. 1716(1) reads “[a] contract shall be of no effect

where the obligations of the parties or one of them are unlawful or immoral.”

This being the general rule, the picture changes when we consider administrative contracts as envisaged under Art. 3171. As opposed to Art 1717 which says “the motive for which the parties entered into a contract shall not be taken in to account in determining the unlawful or immoral nature of their obligations”, Art. 3171(1) basically views the nature of the object from the perspective of its motive. Thus, a contract shall be null on the ground of unlawful cause where it is made by the administrative authorities with [an unlawful object in view.] (Art.3171 (1))

One instance of unlawful motive is available under art.3171 (2). If the “ contract is made by the administrative authorities with a view to procuring advantages of a pecuniary nature to the other contracting party and not for a reason of general interest” then such a view is an unlawful view which plays in favor of nullifying the contract. As per the clarifications of view on this matter by Rene David, “these two Articles (i.e. 3170 and 3171) are devised to protect public interest from possible mistakes committed by administrative authorities and the dealings made by authorities and individuals to thwart public interest and promote individual interest”. These two provisions are not sufficient to avoid the potential dealings. This is even conceded by the drafter of the civil code. However, Rene David tries to mitigate the issue by calling upon the liberal economic system that the country was following. As such he argued by saying too much intervention seems impossible.

Review Questions

1. Have you understood the peculiarity of administrative contracts? Explain the difference between Art.1716 and 1717 on one hand and Art.3171 on the other hand.
2. Discuss the historical context of administrative contracts without forgetting to analyze the conditions that necessitated government intervention in the private domain.
3. Compare and contrast administrative contracts and other forms of contracts.
4. What are the conditions that warrant direct procurement? What makes the same different from open bidding?
5. Why do you think the master draftsman limited the degree of intervention only to Articles 3170 and 3171? Do you agree with the limitation? Why? Why not?

Summary

Administrative contracts are recent phenomena considered with other forms of contracts. This is attributable to their nature.

These contracts are special because of the interests they manifest and the parties they involve. Though the civil law system considers them as special, the common law seems indifferent towards them. This has resulted in different outcomes in both legal systems. The Ethiopian civil code has opted to follow the French approach of specially treating administrative contracts.

In Ethiopia, administrative contracts are considered special because they are considered sensitive to issues that involve the public at large.

Consequent to this, administrative contracts are special in their form, object and parties. The pre-contractual setting of administrative contracts is also special in a sense that the law clearly regulates the pre-contractual situation of the parties. This is done by the civil code and the Proclamation.

Unit II

Effects of Administrative Contracts

Introduction

This unit will basically deal with the task of evaluating the law of performance with respect to administrative contracts. After forming a valid contract the next logical issue will be executing the contract. Performance will therefore be execution.

The unit also discusses the modality, time and form of performance. The unit also presents discussion on non-performance where it will discuss such issues as effects of non-performance, notice and forced performance. Finally the unit discusses variation of administrative contracts.

Unit Objectives:

At the end of the unit students will be able to:

- explain the peculiar features of administrative contracts with relation to performance, non-performance and variation.
- identify pre-contractual conditions that are pre-set to effectively execute administrative contracts
- define performance and non-performance with regard to administrative contracts

2.1 Performance of Administrative Contracts

Preview

Normally performance includes an act of giving, doing or not doing as the case may be in view of the creditor, the creditor's agents or anyone who is to benefit from under the contract.

Performance of a contract under normal course of things extinguishes the obligation. Upon performance the respective obligations of the parties to the contract will come to an end.

In principle, a contract is binding upon the parties to it as if it is a law. Art 1731(1) to this end prescribes as:

“The provisions of a contract lawfully formed shall be binding on the parties as though they were law”

Thus the first source of obligation will be the contract duly formed by the parties.

The parties to an administrative contract are the administrative agencies and the contractors. Contracts validly formed by the parties will try to address the who? Whom? And how? questions that are associated with the contract and the consequent performance.

Who should Perform?

The contract can be performed by the debtor, his agent or by a person authorized by court or law (Art. 1740(2)). The persons authorized by law are tutors, liquidators, trustees and a person authorized by court is either a curator or an interested creditor who wants to save the rights of the debtor by performing his obligation. However, the law never mentions about performance of a contract by a third party who is not authorized by debtor, court or law.

Never the less, we can easily argue that if the creditor accepts the payment, the debtor has no right to stop a third party from performing the obligation since the creditor has a right to assign his right to a third party without the consent of a debtor (Art. 1962). In such case, if the debtor insists on paying the debt, he can pay it to the person who has

already paid the creditor (Art. 1824). The law refrains from including unauthorized third party in the list of Art 1740(2) since assignment of a right is a contract. A creditor is not duty bound to receive payment from a person not authorized by debtor, court or law. He/she is free to accept or reject such payment without any effect on his/her right against the debtor.

However, the creditor may sometimes insist that the debtor himself should perform the obligation (Art. 1740(1). This is when the contract or the law expressly provides that the debtor shall perform the contract personally. For example, Ethiopian Labor law provides that the employee should perform the contract personally.

The second case where personal performance becomes necessary is when the creditor proves that personal performance is essential to him. The creditor can prove such only when the obligation is obligation to “do” of a professional nature or art. For example, a lawyer, or a doctor can not authorize a duty which he agreed to do. Moreover, a musicians, painters, Poet, actor, dancer etc cannot authorize someone to perform his obligation.

Generally, the creditor should accept performance either from the debtor, his agent or person authorized by a court of law unless he proves that personal performance of the contract is essential to him by the contract or a the law expressly provides personal performance.

The rule under our law is available under Art.1740 (2). According to this provision “... the obligations under the contract may be carried out by a third party so authorized by the debtor, by the court or by law.”

Thus a contract may be performed by anyone, not only and solely by the debtor but by an gone. We require the debtor and only the debtor to

perform the obligations under the contract if “... this is essential to the creditor or has been expressly agreed.” (Art.1740(2)) if the creditor benefits only if the debtor personally performs the obligation then only the debtor personally should perform the obligations under the contract. On the other hand if there is an express agreement to this effect of performing the contract personally by the debtor then even though not essential to the creditor still the obligations should be executed by the debtor.

Does this rule squarely fit to administrative contracts?

An example

Assume ERA (Ethiopian Roads Authority) enters into a contract with XYZ construction company to construct a bridge on river Abbay. Can XYZ Construction Company pass the obligation to CRBC?

- If among other things XYZ was picked by ERA for the artistic genius of the company then the design cannot be performed by any other company. (1740(1))
- If the contract with ERA is to construct a bridge and nothing else, XYZ construction may authorize CRBC. (1740(2))

Art 3172(1) says “... contracting parties shall perform their obligations in a manner provided in the contract”. Based on this provision contracting parties may agree to the effect of carrying out obligations personally. Even the last sentence which reads “... or has been expressly agreed” authorizes parties to have the said stipulation of imposing an obligation on one of the parties to enable personal performance of the obligation.

What is wrong if a person bus is not authorized by the debtor, the court or the law performs an obligation? In the case of administrative contracts, we have Articles 3201-3206. Let us briefly consider the case together with for who to perform sub-section.

For Who to Perform?

Performance can be made, according to Art. 1741, to the “creditor or a third party authorized by the creditor, by the court or by law to receive it on behalf of the creditor.” Therefore, the debtor should take every caution so as not to pay either for an incapable creditor or to an unqualified person.

With respect to incapacity, the law is referring to one whose cause is interdiction or absence for that matter. This is so in association with physical persons. But administrative contracts involve parties that are juridical persons. Thus at least one of the parties to an administrative contract is a juridical person. Accordingly the incapacity consideration with regard to juridical persons is a different one. Thus it cannot be insanity or senility. That is, the causes of incapacity that we know with respect to physical persons are not important here. Rather we should look for the causes somewhere else. Can you mention any ground of incapacity for a juridical person? Or rather from where does a juridical person derive its capacity?

A juridical person derives its capacity from the law or the instrument that establishes it. Establishment, registration and license are some of the sources which confer capacity. As the case may be the law prescribes how juridical persons derive their capacity. Accordingly, they may derive their capacity from a proclamation or a memorandum of association. Proclamations are usually sources of capacity to administrative authorities while a memorandum of association serves to establish enterprises. Therefore a juridical person lacks capacity when it is not constituted in accordance with one of the ways mentioned above. This is not the only way. Administrative authorities may lack capacity after due constitution. This usually results following the revocation of license, dissolution or even amalgamation. Paying to an administrative

authority which has undergone through one of the above processes will amount paying to an incapable creditor.

When does one pay to an incapable administrative agency? Can you imagine a situation when an administrative agency enters into an agreement with full capacity but afterwards lacks its capacity?

If this happens, the debtor cannot validly discharge his/her debt by paying to such an entity.

Most of the time the obligations incurred on the part of the debtor involve non-monetary obligations. Non-monetary obligations are susceptible to manipulation because it is difficult to gauge in terms of objective standards such as numbers. So the general contract provisions might not be properly operative under administrative contracts. Let us briefly discuss provisions of the law that govern the manner of performing administrative contracts.

Bona fide performance

One of the pillars of contractual relationships is good faith .Good faith in turn is something expressed and not legislated-better practiced and inferred and not derived.

Because bad faith or good faith, as the case may be, is a state of mind which hardly can be implied without being expressed, one should seek the same from circumstances.

One outlet of good faith during performance will be carrying out our obligation diligently. Diligence still is susceptible to manipulation unless we have a working standard for the same. Our law provides the requirement of diligence and the nature of the same under Art.3172 (2)

and Art.3172 (3). To begin with, Art.3172 (3) prescribes “[The contracting parties] shall perform [their obligations] diligently.”

To this end the obligations shall be performed in a correct manner deemed to be satisfactory according to the rules of art prevailing at the time and in the kind of activity concerned “(Art.3172 (2))

Our law postulates diligence as a standard of good conduct. Unlike other systems our law further goes in trying to stipulate this very standard of diligence.

How should one understand diligence under the Ethiopian civil code? It is synonymous with the rules of the art prevailing at the time and kind of activity. Different trades prescribe as to the how works are done. These prescriptions might have evolved from custom or written and learned rules of conduct i.e. rules of ethics. To see whether one is diligent or not it suffices to see whether he/she is acting in accordance with these rules while carrying out duties. Additionally these rules of conduct are conditional on the type of activities. Rather than dealing with the most volatile and hypothetical concept of diligence our law tries to crystallize it and associate it with the more concrete concept of prevailing art.

2.2 Manner of Performance.

The modality of performance is conditioned on the letters and spirits of the contract. This can be gathered from Art.3172 (1). Furthermore, the “unless otherwise agreed” proviso of Art. 3173 stresses on the fact of giving the chance to the parties of an administrative contract in determining the manner of performing the contract. Hence the law itself gives priority to the contract to which parties have the freedom to form and determine its content.

In the absence of a contractual stipulation, however, the law authorizes the contractor to “... choose the suppliers for the purpose of buying

materials and things necessary for the performance of his obligations.” This is as to Art.3173 (1). Still in the absence of an agreement Art.3173 (2) empowers the contractor to” ...choose the workmen or employees to perform such obligations under his responsibility.” As you might guess administrative contracts do not end where they begin. There are large projects which require special expertise. Among other things, for efficiency and quality reasons it might be important to invite parties other than the original ones to the contract. These people include the sub-contractor, the architect and the sub-architect.

Time of Performance

Implicit to the freedom of contracts principle, parties to any contract have the freedom to determine the time when they execute their obligations. Thus “Payment shall be made at the agreed time” of Art.1756 (1) is the principle. Art 3174(1) reiterates this very principle when it says “each contracting party shall perform his obligations within the time fixed by the contract.” What if such time is not fixed? Well, Art. 1756(2) says “... payment may be made forthwith.” “When is forthwith”? Does it mean immediately?

It is not “immediately” in our case because Art.3174 (2) says “failing a specific provision in the contract each contracting party shall perform his obligations within a [reasonable time].” We say a “reasonable time” proviso is more reasonable than a “forthwith” one. Why? The law still has the spirit of sensitiveness with regard to time matters when it prohibits administrative authorities from unilaterally imposing a time on the contractor. Art. 3175 reads:

“The administrative authorities may not impose unilaterally on the other contracting party a time which has not been agreed upon for the performance of his obligations unless they may under the contract fix such time by means of requisition orders”.

Accordingly administrative authorities are legally insulated from the practice of taking contractors by surprise. This prohibition is even against the prerogatives of administrative contracts such as one under Art. 3179. Art. 1756(3) invites another instance of requiring performance. As such, “payment shall be made whenever a party requires the other party to perform his obligations.” But should this be dependent on will and whim of the requiring party? No! The law provides standards under Art.1757. Let us see Art. 1757(1)

Only a party who benefits by a time limit having regard to the forms or nature of the contract or [who has performed] or [offered to perform] his obligations [may require] the other party to carry out his obligations under the contract.

Therefore, to require one should perform or at least offer to perform his/her obligations. To require the other to perform his/her obligations, one should either perform his/ her obligations or at least show his/her preparedness to perform the obligations.

This principle is the so called “exceptio non adempti contractus.”

As a natural consequence of course, one party is entitled to refuse to perform where the other party clearly shows that he will not perform his obligations or where the insolvency of the other party has been established by the court.” [Art. 1757 (2)]

This scenario is excepted however under Art. 1759. (You may refer this same Article)

One other exception of the principle is available under Art.3177. Thus unless the non- performance of the contract is impossible, the contractor may not avail himself of Art 1757(2). Let us read the full text of 3177.

3. The non- performance by administrative authorities of their obligation shall not entitle the other party to fail to perform his obligations unless it makes impossible the performance of such obligations.

In other cases, the other party may not avail himself of the failure by administrative authorities to perform their contractual obligations .Now, please read Art.1757 (2). What do you understand?

Policy Considerations

Under this title we will briefly consider the policy considerations that lie behind administrative contracts. Even though behind each rule and for that matter behind administrative contract law generally we have a policy consideration, taking Articles 3177 and 3178 will basically show what is at stake if we are not going to treat administrative contracts as specialties.

Article 3177:

The essence of this article is that the contractor may not refuse to carry out his/her obligations, simply because the administrative authority has failed to carry out its commitments. Because administrative authorities are into a contractual relationship representing the public, pursuing such an interest solely based on general contract provisions will jeopardize the general interest. Imagine a contractor that is at every liberty to refrain from supplying a service to the public for failures on the part of authorities to effect the necessary payments. In this case the law has opted to oust the contractor from the normal right of withholding once own performance while on the other hand enabling administrative actions against unreasonable authorities.

Article 3178

What is a fiscal debt? Why is fiscal debt not subject to set-off? Is there any possibility of setting off debts under administrative contracts?

Art 3178 talks of the possibility of setting off debts. But it automatically rules out set off in the case of fiscal debts. One example of fiscal debt is the debt that we owe to the state in the form of tax. Art.3178 accordingly bars anyone from setting off such a debt to extinguish a debt. We cannot set off the debt we are owed to against the tax that we owe to the public. Fiscal debts such as tax should be performed without preconditions. What is the concern of Art.3178? Its full text reads as follows:

“Set off may not be invoked by a person contracting with the administrative authorities except in the case of debts other than (fiscal debts)”.

The general spirit of the law with regard to set off is expressed under Art.1833 (b) which reads as “set off shall occur regardless of the cause of either obligation except where the obligation is owing to the state or municipalities”. But Art 3178 further explains the obligations that we owe to the state by saying that they are “fiscal debts”.

2.3 Non Performance of Administrative Contracts

One of the points where contracts prove to be laws and not mere agreements is upon non performance. Contracts are not mere agreements because upon non-performance they have legal effect- an effect sanctioned and enforced by the law.

We speak of non- performance only when the obligations undertaken by the parties are not executed. Otherwise performance extinguishes obligations. If obligations are not performed in accordance with the spirit and letter of the contract then the non-performing party will be, as the

case may be forced to personally perform or to pay damage to neutralize the costs of non-performance. These are not the only consequences of non-performance. Let us consider the effects of non-performance under our law.

2.3.1 Effects of non-performance

Depending on circumstances, a contracting party is entitled to take measures independently or cumulatively. What are the measures under the law? As per Art.1772, requiring the enforcement of the contract or the cancellation of the contract as of self help is authorized. "In addition," it is also possible to require compensation for damages sustained because of non-performance.

But these rights under Art.1771 should be preceded by one condition of the law and that is giving notice. Let us briefly consider these rights under the law.

2.3.1.1 Notice

Even though the special rules that regulate non- performance of administrative contracts only presume and do not clearly prescribe the necessity of putting a non-performing party in default with notice the general rules that regulate contracts regardless of their genre emphasize on the necessity of giving notice. Before considering basic issues that circumvent notice let us discuss the importance of giving notice.

As a matter of law default notice puts the non-performing party in default. The notice in this sense is an indispensable proof of the intention of the non-performing party. Notice plays this role because it

helps the performing party to solicit the real intention of the party to be put in default.

Not less important, notice signifies the right time to determine transfer of risks. Date of notice denotes the date of transfer of risks.

If so, the law prescribes in favor of default notice as a condition to be complied with in case one is going to implicate a non- performing party to this end that he/she is not performing. Art.1772 underlines the issue as:

“A party may only invoke non- performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract”.

This being the rule, Art.1775 excepts the general requirement of notice under Art 1772. On the face of the situations envisaged under Art.1775, the law withdraws the requirement of giving notice Generally, we have four conditions under Art.1775 If the obligation is to refrain from doing something, if the obligations assumed are those to be carried out within a fixed period of time and when they are not carried out within this fixed period, where the debtor clearly shows in writing his/her intention not to perform or when the parties have an agreement not to give notice then the law out rules the importance of giving default notice.

What does the picture look like in the empire of administrative contracts? Art.3196 for example mentions notice only occasionally while it is prescribing about “interest for delay”. That is why initially we said administrative contract rules presume and only presume but do not legislate on notice issues. This clearly shows that the general rules of notice are applicable by default no matter what form the contract takes. Even in the absence of the inference we made, the master draftsman’s commentary on the subject matter makes the point clear. As such he

held “Articles 3194-3200 present us Articles 1771-1805 by further elaborating and innovating them”. None the less, Art. 1775 inspires us about the contract that will possibly determine the fate of default notice. With the exception of Art.1775(c) the other provisions under Art. 1775 are inspiring of the content factor. Another instance where default notice is mentioned, in the mean time of course, is Art.3198. These two occasions under Articles 3196 & 3198 are indicative of the effectiveness of the general provisions of contract.

But notice that the terms of the contract will however determine the necessity or other wise of notice.

Example

The Ministry of Agriculture has recently entered into a contract with a Chinese construction company to construct a “Millennium Hall” to be operative upon the beginning of the new millennium by entertaining on this first day a big music festival. Unfortunately the company was incapable to do so. Rather if given three months the engineers are pretty sure to finalize the work. They know this standing on 1 Pagume 1999. Should the Ministry give default notice?

As a reminder let us consider some issues in lieu with notice. The first being the form of notice, the consequent will be a discussion about time of notice.

2.3.1.1.1 Form of Notice

The law is not that much concerned with the form of notice Rather the motive of the law of notice is assuring the intention of the creditor in unequivocal manner. Thus if we are in every position to meet this desire of the law our notice may take any form. Art.1773. further says:

“Notice shall be by written demand or by any other act denoting the creditor’s intention to obtain performance of the contract.”

Accordingly, we may confidently say:

- a. Notice may take any form
- b. Notice should clearly show the intention of the creditor.
- c. Notice may not be given unless the obligation is due

One question worth asking however is, “Is it “important to prove notice”? Well, as was said, the form of notice and strict adherence to such form is not a question of law. However it could be a good question of fact. Stated otherwise, the law does not force us to follow one or another form. However, issues of proof oblige us to give a notice which later on can be adduced without difficulty .Therefore, for good or for bad it is wise to give default notice whenever important, in the wisest form possible.

2.3.1.1.2 Time of Notice

In general, creditors have this right of fixing a period in the notice they give. Such period puts the time frame within which the creditor expects performance of the contract. Under such notice the creditor will clearly show his intention not to accept performance after the lapse of the stipulated period. The law does not fix such a period as it does not prescribe a certain form of notice. Never the less, the law does not hesitate to attribute a minimum content to the notice. To this end such a notice is expected to be “reasonable having regard to the nature and circumstances of the case”.

2.3.1.2 Forced Performance

As a concept, forced performance denotes the possibility of physically forcing the debtor to perform the stated obligation, to deliver a property,

to pay money or to undo what was done contrary to the terms of the contract. The word 'forced performance' implies the compelling of the debtor to discharge his/her obligation. It refers to performance directly imposed on the debtor through the execution process. Thus, it takes place through court order/judgment. However, it is important to note that the court may not order forced performance merely because the creditor has requested so. The court has the power to order forced performance or decline considering the requirements set by the law. Article 1776 provides the conditions for ordering forced performance or otherwise. It reads as follows:

Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor.

Pursuant to this provision the requirements for the application of forced performance are (1) the creditor's special interest, and (2) the preservation of the debtor's personal liberty. These requirements are cumulative not alternative.

The first thing that the court shall determine is whether performance is 'of special interest to the creditor'. The presence of special interest can be inferred from the importance of the obligation required to be discharged towards the creditor and its possibility of being discharged otherwise. If forced performance has no special advantage to the creditor, then the court may not order it.

Then, the court shall consider whether forced performance affects the personal liberty of the debtor. A person cannot be deprived of his liberty for failure to discharge contractual obligations. Thus, if forced performance affects the personal liberty of the debtor, the court shall not order it.

The two conditions must be fulfilled for the court to order forced performance. Here are some examples. Assume, a monopolistic entity which supplies vital goods (e.g. water or electricity) or services (e.g. postal or telecommunication) to customers cuts off its supplies. In this case the goods or services are so essential, and the customer cannot get them from other sources. Thus, it may be said forced performance is of special interest to the creditor, i.e., customers. At the same time, order the entity to provide these goods or services cannot deprive the entity's liberty (as only physical persons enjoy liberty). So, in this case the court may order forced performance.

In addition to forced performance, the law provides substituted performance as a remedy for non-performance under articles 1777 and 1778. Substituted performance is made at the expense and cost of the debtor.

Art. 1777. –Obligation to do or not to do.

- (1) The creditor may be authorized to do or to cause to be done at the debtor's expense the acts which the debtor assumed to do.*
- (2) The creditor may be authorized to destroy or to cause to be destroyed at the debtor's expense the things done in violation of the debtor's obligation to refrain from doing such things.*

Pursuant to sub-article 1, the court may, upon creditor's application, authorize the creditor to do or to employ third person to do what the debtor has failed to do at the cost and expense of the debtor. Pursuant to sub-article 2 the creditor may be authorized to destroy or to employ third person to destroy the things done by the debtor in violation of his obligation not to do such things. The cost and expense of such destruction shall be borne by the debtor. Court authorization is,

however, indispensable for substituted performance. Without such authorization, the creditor can not recover the costs and expenses from the debtor. Articles 2330 and 2333 on law of sales are in the same line with concepts under Arts.1776 and 1777(1). Under Art. 2330, the buyer may not demand forced performance in conditions where purchase in replacement is possible for the buyer. The same is true for the seller when the buyer refuses to take delivery and pay the price. Here, the seller may not demand forced performance in circumstances a thing in respect of which a compensatory sale is imposed by custom.

Sub article (2) of this provision confirms substitute performance of obligation not to do. The creditor can destroy or get destroy the things made in violation of the obligation to refrain from doing such things with court authorizations at the debtors expense.

Article 1778 also deals with substituted performance in respect of obligation to deliver fungible things. It reads:

Where fungible things are due, the creditor may be authorized by the court to buy at the debtor's expense the things which the debtor assumed to deliver.

Where the fungible things are due the debtor may have substituted performance be made up on court authorization to buy the thing at the debtors expense.

The provisions of Articles 1779-83 are also aspects of substituted performance but they apply in different circumstances. When the debtor is ready to perform but unable to discharge his obligation either because the creditor refuse to accept performance or the creditor is unknown or uncertain or where delivery cannot be made for any reason personal to the creditor. In all these situations, the debtor has no fault; ready to

perform but prevented from performing. Thus, the law allows him to discharge his obligations by depositing the thing or money at such place as instructed by the court. This will relieve the debtor from his obligations. However, the deposit shall be made upon court order and the debtor shall obtain a court confirmation as to the validity of the deposit.

The issue of forced performance is sensitive because it involves the physical coercion of a personality. The jurisprudence behind it emphasizes that contracts are not servitudes so they should not go to the extent of subjugating the personal liberty of a person. The concern therefore is freedom, the fear being making the debtor the slave of the creditor.

Therefore, forced performance is a situational remedy available if certain conditions are met.

Art.1776

Unless the performance in that way is of special interest to the party requiring specific performance and unless the contract can be enforced without affecting the personal liberty of the debtor, the court cannot order the specific performance of a contract.

Two conditions in a cumulative way should be fulfilled if the court is to order specific performance.

In no case however forced performance can exist as an instance of self help. This one should be taken as a third condition.

When thinking about specific performance, we have to think of a court weighing circumstances on the basis of Art.1776.

Turning to administrative contracts we have Art. 3114. As of rule, Art.3194 (1) says “the court may not order the administrative authorities to perform their obligations.” As of prerogative, Art 3194(2) provides administrative authorities with the choice of paying damages or performing their obligations.

What is wrong with forcing administrative authorities to “institutionally” carry out their obligations? Does it amount to subjugating their liberty? What is their liberty?

Under Art.1776 the nature of the obligation determines the order of the court. If the obligation is to be carried out and if this is to the special interest of the creditor and if carrying out the obligation does not jeopardize the personal liberty of the debtor the court shall order the debtor to personally carry out the obligation.

The “personal liberty” requirement cannot be extended to administrative authorities at least for two reasons. In the first place administrative authorities have “institutional” not “personal” trait and the law speaks of “personal liberty”. In the words of John Salmond, not all the rules that apply to natural persons need be extended to corporations. Secondly, the law under Art.3194 (2) tacitly admits that the performance of an obligation by the administrative authorities does not jeopardize their liberties. The law puts the performance of obligations at the mercy of the administrative authorities.

Is Art 3194(1) amenable to manipulations? For example assume Ethiopian Roads Authority signing an agreement with BXC Construction Company on the terms that ERA will cover the costs and fees of the work while BXC Co. undertakes the obligation of designing the work, supplying construction materials and workman and constructing a

bridge. ERA fails to cover the costs and fees. Can BXC Co. apply to the court requiring the same to order forced performance? Why? Why not? Art. 3194 is operative on the assumption that administrative authorities are debtors. What if the contractor is the debtor? Can we force him to perform the contract personally?

2.3.1.3. Cancellation of Administrative Contracts

Cancellation denotes the situation where parties declare the cessation of obligations prematurely. This is done for different reasons. Among other things, parties resort to cancellation when one or both of the parties fail to do what otherwise they ought to do, do what they ought not to do or when one fails to deliver what he/she has to deliver for different reasons.

What can be taken as one other effect of non- performance is cancellation of the contract. Legally we have an out sourced and a self sponsored cancellation depending on circumstances. Thus cancellation may be a self- help measure when parties have previously agreed about it in their contract, where one of the parties has failed to perform his obligation within the time fixed as per Articles 1770, 1774 and 1775 or where performance by one of the parties is hindered or has become impossible. This last condition is independent of the first two because cancellation is demanded before the obligation has become due. Thus, Article 1788 holds “A party may cancel the contract even before the obligation of the other party is due where the performance by the other party of his obligations has become impossible or is hindered so that the essence of the contract is affected”.

These above conditions authorize parties to unilaterally cancel their contracts. Unilateral cancellation should not imply cancellation solely

undertaken by the party resorting to it. Far from this, there are conditions that call for the intervention of courts.

Art 1789 envisages still another probability warranting a self-sponsored cancellation of contracts.

But this self-help measure is available so far as the conditions mentioned above are fulfilled. Short of that, cancellation should be effected only upon the authorization the court. (Art.1784).

This still is not tantamount to that courts will not intervene under cases mentioned earlier before and coming under Articles 1786, 1787, 1788 & 1789. Rather, the specific instances envisaged may require the authoritative determination of courts.

The position of the law under general contracts being this, what does it say concerning administrative contracts? Basically the special rules that deal with administrative contracts do not say anything on this matter. This however may not force us to conclude that parties under administrative contracts do not have this remedy at their disposal. Far from that Art.1676 is indicative of the possibility of applying those rules on cancellation in case of administrative contracts.

In association with this discussion none the less it is worth commenting on Art.3180 which talks about “termination of contract.” We underline the worth of this because the concept under Art. 3180 is susceptible to the following proliferated interpretations:

- a. Taking Art. 3180 as a cancellation proviso and specially a unilateral cancellation proviso
- b. Taking Art.3180 as a termination proviso at face value

- c. Taking Art. 3180 as an invalidation clause specially when considering the Amharic version of this same Article.

A Synopsis of Invalidation, Cancellation and Termination: A cautious approach to Article 3180.

As you might have understood you clearly know by now, these three concepts are quite different concepts but they similarly signify the termination of a contractual relationship (Art 1807).

Focusing on the differences we see that cancellation implies normally and validly formed contract while termination implies the formation of another contract (note: please consider Arts. 1675 and 1819 again) in the first place. In the case of termination, we have a contract created an obligation and still a grand contract that has extinguished a contract thus ending up by having two contracts.

Invalidation means making an effective contract ineffective when it has a problem in its formation. Invalidation is related with the problem in the formation of the contract. Invalidation comes into question when one of the parties wants to be free from the contractual obligation owing to a problem in the formation of the contract.

Therefore, the mere presence of willingness of one party to have a contract invalidated is not enough and, the legally provided grounds shall also be fulfilled. Lack of capacity and lack of sustainable consent are among the grounds that render a contract invalid.

The nature of invalidation of a contract is reflected in its effect. Now that invalidation of contract takes us to the conclusion that the contract is not properly formed, the effect of contract is said to be restitution. The contracting parties are put to the place where they were before the formation of the contract.

Sometimes compensation might be ordered when a contract is invalidated. This might lead us to the conclusion that the effect of invalidation and cancellation is the same in compensation. However, the damage following from an invalidation of a contract shall aim at putting the contracting parties in a place they would have been had the contract not been formed.

Cancellation, on the other hand, is making a contract ineffective when there is non-performance. Cancellation of a contract is one effect of contract in that the contract is formed within the legally provided requirements. When one of the contracting parties fails to perform a contract the other party might cancel the contract as one remedy of non-performance of the contract. There might be again other grounds of cancellation like the condition which results in cancellation.

The other basic difference between invalidation and cancellation lies in their ground. The ground for invalidation is defect in its formation while the ground for cancellation is non-performance. This does not, however, mean that their ground is the only difference. They are also different in their effect. Even though the effect of both invalidation and cancellation is restitution, cancellation additionally entitles the party a compensation that rewards the benefit of contract.

Unless the invalid contract is invalidated, the contract is upheld and becomes effective. Even though the contract might not be performed, the remedies of non-performance will be due. Under Ethiopian law of contract anybody that wants it to be invalidated cannot invalidate a defective contract. It shall be the party who is affected by the invalid contract that can invalidate the contract. Article 1808 (1) of C.C is provided to this effect stating in its wording:

“A contract which is affected by a defect in consent or by the incapacity of one party may only be invalidated at the request of that party”

The basic reason to entitle the party that is affected by the invalid contract the power of invalidating the contract is to protect the interest of that party. The other party whose consent is not affected or who is not incapable is considered to have full information or rationality behavior. Unless he suffers from information asymmetry or was irrational at the time of the formation of the contract there is no reason to help him by empowering him to invalidate the contract.

This does not, however, mean that no one other than the party who is affected by the contract can invalidate the contract. Representative of a party who gave his consent either by defect in consent or under incapacity can invalidate the contract. Representatives of the party that is potential to be adversely affected by the invalid contract might be in a position of enforcing the rights of the party. If for example a minor enters into a contract, the minor may not necessarily invalidate the contract by himself. His tutor can invalidate it, as his tutor is his legal representative.

According to sub-Article two of this provision, however, any party is entitled to invalidate an invalid contract in the definition of this provision. Article 1808 sub Article (2) connotes that “A contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party”. This provision is not clear in its position as to a contract whose object is not sufficiently defined and whose object is impossible. Whether such contract is included under this provision is a gap to be filled by interpretation.

When we generally observe the spirit of the provisions, contracts whose object is not sufficiently defined, impossible and which do not in a prescribed form seem to be incorporated by analogical interpretation. In spite of the fact that sub Article (1) of the provision does not include a contract which is defective owing to the aforementioned grounds, its exclusion does not mean that such contracts are valid.

If such contracts are not valid, the effect of a contract whose object is invalid or immoral is the same as the effect of contract whose object is not sufficiently defined, made in a prescribed form, and whose object is not possible. Articles 1714 (1), 1715(2), 1716(2) and 1720(1) clearly show that the above mentioned grounds shall render the contract ineffective.

Capacity and consent do not, however, render a contract ineffective. These grounds, rather give one of the parties the power either to invalidate the contract or give it effect. Therefore since the grounds provided under Articles 1714 (1), 1715(2), 1716(2) and 1720(1) are similar in rendering the contract defective, it is advisable that Art.1808 (2) shall include a contract whose object is not sufficiently defined, and not possible by analogical interpretation with all the criticisms.

In addition to insufficient coverage, the provision seems to connote that void contracts are subjected to invalidation as the phrase "... may be invalidated at the request of any contracting or any interested party..." is put to that effect. Its being under the title of extinction of obligation, along with this provision also leads to the conclusion that unless void contract is invalidated, the obligation created is not extinguished. Even though this seems a logical conclusion which takes its premises from the title of Chapter 3 and Article 1808 (2), giving effect to an illegal or immoral contract is not only absurd but also in contrary with 1714 (1),

1715(2), 1716(2) and 1720(1) of the Civil code which shows that such contract shall be of no effect.

However, the concept of invalidation depicts the picture making a potentially effective contract ineffective. A contract, which is not invalidated, is required to have effect like any other contract. It is this effect of invalid contract that begs its invalidation to make it ineffective and correct the error it imposes on contracting parties. If the contract is void, however, it does not have legal effect from the very beginning.

Provisions that cover the requirements whose absence renders a contract void vividly shows the ineffective nature of such a contract. Under Article 1714- it has been vividly stated that the contract shall be of no effect by law not by invalidation if “the obligation of the parties or one of them cannot be ascertained with sufficient precision.”

Article 1715 again renders a contract, whose object is absolutely impossible and insuperably ineffective. Similar connotations have been incorporated in Articles 1716, 1717 and these provisions in effect show that the contract is no more effective.

Noncompliance of formal requirements also renders a contract void or ineffective. We can infer this from Article 1720 in that a contract which is not made in the prescribed form is not a contract; it is rather a mere draft. From this inferred conclusion it is not illogical to infer that a contract, which is not made in a prescribed form does not have legal effect. For someone’s amusement this provision even says that it is not a contract but rather a mere draft. Invalidating an agreement which is not contract seems to be absurd.

Having the above affirmation in mind, Article 1808 seems to be in contradiction with the very nature of invalidation that is rendering a contract ineffective and with the provisions, which deal with the effect of noncompliance of the requirements. This provision is also on the grounds of extinction of obligation. Invalidation of a contract is one of the grounds. Unless a contract, which shall be invalidated, is not invalidated, the obligations created are not extinguished in the absence of other grounds. It is questionable if this is true for a contract whose object is undefined, unlawful, immoral or impossible. From the very beginning no legal obligation is created under such contracts

If it does not have legal effect there is no need to have such agreement invalidated. There is not any created obligation to be extinguished by invalidation. Such nature of void contract casts doubt if invalidation of such contract really extinguish obligation as void contracts do not create effective obligation as it has been seen before. Be that as it may the invalidation of contracts which have no effect by the function of law has been put under the extinction of obligation by invalidation.

An invalid contract can result in the extinction of contract even though it is not invalidated. Notwithstanding the fact that a contract is invalid, the reaction of contracting parties to a contract is not necessarily invalidation. Contracting parties can also resort to other options like refusing performance without having the contract invalidated.

Article 1809 denotes that a party entitled to invalidate a contract can refuse performance at any time. The contracting party can extinguish the obligation by refusing performance of a contract. Albeit the absence of the act of invalidation, the obligation will thereby be extinguished. The right to refuse performance seems, however, to be made at any time without any prescription. The basic difference between termination on

the one hand and invalidation and cancellation on the other is their effect. The ground of termination is not again attributable to defect in the formation of a contract or non-performance on one of the parties. Termination can be made by agreement, unilaterally by one party or by court order. However, the grounds of invalidation and cancellation are defect in consent and non-performance in accordance to the terms of the contract respectively. In relation to the effect of the two categories as stated above, invalidation and cancellation have retrospective effect while the effect of termination is prospective. Article 1819 Sub (2) and (3) are obvious in indicating the prospective nature of termination. Quite the reverse, Article 1815 is testament for retrospective effect of invalidation and cancellation.

Invalidation, on the other hand, implies a contract that is not validly formed in the first place. Depending on cases such a contract might be void or voidable contract. Hence, lack of consent, capacity, form when required) or lack of a legal or moral object among other things may cause the invalidation of the contract. Semantically Art.3180 is about termination and still about invalidation (for the latter case it is wise to refer the Amharic Version).

But what are the real causes that set Art.3180 in motion? Let us consider the full text first:

“The administrative authorities may terminate the contract notwithstanding that the other party has committed no fault where the contract has become useless to the public service or unsuitable for its requirements”.

The existence of two independent conditions justifies the decision of an administrative authority to “terminate” a contract. One the contract

should prove to be” useless to the public service” or the contract should “become unsuitable for its requirements.”

Do these remind you of Art.3170 which deals with lack of cause (object) on the part of contracts? Can you now read Art.3170 with Art.3180 and ultimately with our previous discussion on invalidation thereby referring to Art.3180 (2).

Summary

This chapter discussed the effects of administrative contracts in conjunction with ordinary contracts. It has shown We saw that the effects of administrative contracts are many fold.

Some of the effects considered include performance and non-performance, each having their own effects.

In our consideration of performance as one of the effects of administrative contracts, we raised issues as for whom to perform? How to perform? When to perform and other related issues were addressed.

As it is another one other effect of administrative contracts, we deliberated on the question of non-performance and Its consequent effects. It was at this juncture that we considered the giving of notice and forced performance. Especially the case of forced performance of administrative contracts was underscored as it was special

Finally cancellation and invalidation were considered as part of effects of administrative contracts. We said that the two concepts are quite different and stand on different jurisprudential pillars. While cancellation presupposes a validly formed contract invalidation presupposes unhealthy contract from the outset.

Review Questions

1. Discuss the similarity and the difference among cancellation, invalidation and termination in light with administrative contracts.
2. How do you understand the concept of capacity in administrative contracts? Give examples that will illustrate an incapable administrative authority.
3. Why do not we have a special formality requirement with regard to default notice? What justifications are raised by those who advocate the importance of following a special formality requirement?
4. Explain the principle of “exceptio non adempti contractus”.
5. What is a fiscal debt? Explain by giving examples.

Chapter III

Concession

Introduction

Objectives

At the end of this chapter, students will be able to:

- define concession
- appreciate modes of concession
- consider how to vary, revise and terminate administrative contracts.
- understand the special nature of concessions.
- appreciate how the law strikes a balance between two conflicting interests.
- understand how the law protects the interest of the public.

3.1 Definition

What is concession?

In its legal sense, concession is not clear contract so just like any other contract the requirements of the law of contracts should be met. But what makes concession a special contract is its being an administrative contract. With this, all the peculiarities that we tried to see in the last two chapters are conditioned upon. In concession contracts what would otherwise be done by administrative authorities is done by another person called the grantee.

If so, nonetheless, concession is a special form of administrative contracts. This very nature in turn is regulated by Art 3207(2) of our civil code. It says:

“The concession of a public service is the contract where by a person, the grantee, binds himself in favor of an administrative authority to run a

public service getting a remuneration (there of) by means of fees received on the use there of”. Let us consider the elements one by one:

“Grantee”-One of the contracting parties, a private individual that enters in the activity of providing a public service. As the case may be this person can be a juridical or physical person.

“Grantor”- however will be the administrative authority. It is the administrative authority that undertakes to control the grantee and supervise the work of the same.

Public service-In chapter one, we said public service is one of the issues which necessitates government’s intervention in its provision. It is one of the reasons why we have administrative contracts. As per Art.3207 (1) it is any activity which a public community has decided to perform for the reason that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out...”.The inadequacy of private initiative emanates from different reasons. Lack of infrastructural capital, expert management and exposure to externalities can be mentioned as reasons.

Remuneration-This makes the agreement onerous. It is not for free that the grantee will bind himself in favor of administrative authorities. He must get remuneration in the form of fees. So, users of the service will pay fees and these fees will be remunerations. The basic idea behind concession contracts is not profit. Still one cannot say that the grantee should run the service for free. Unlike other business undertakings the grantee is not as free as ever to set discriminatory prices. The public should equally benefit from the prices set by the parties.

Concession is an administrative contract among other things because one of the parties is an administrative authority-see Art .3132(1) cum

Art. 3207. The involvement of administrative authorities however should be regulated. This clearly emanates from the responsibility that administrative authorities have for the good running of the public service.

The role of the administrative authority is supervisory. The grantee has a functional role. For fear of domination, this will result in direct exploitation by the administrative authorities. Art. 3210 (1) says the control should not be excessive. Otherwise, the nature of the concession will be altered.

3.2 Variation clause (3213)

The concession contract may have a stipulation to the effect that adjustments in prices and tariffs will be in place by default. Two issues are important here:

1. The variation is conditional on changes occurring in the prices of certain materials, commodities or services. Not all variations in prices matter but only changes in certain materials, commodities or services. There should be a close relationship between the service provided by the grantee and the variable prices in materials, commodities or services. The changes should affect the prices of the public service. Unreasonable price adjustment is not favored here.

Example:

XYZ Co. has recently agreed to run a cafeteria in one of the institutions of the Federal Government. Among the services provided, food and drinks take the maximum share. Very recently the grantee is thinking of increasing the price of food in a significant way. When responding to the reasons behind the increment, the grantee mentions the increase in the

price of fuel as one of the reasons in addition to the increase observed in the price of sugar. Now the institution in which the service is ran (the grantor) wants to solicit your opinion as to validity or invalidity of the adjustment. Advise it.

2. The new prices should be proportional to the change in the other prices. You may not impose disproportional tariff on users of public service under the guise of variation. In case of disputes, courts are authorized to fix prices. In the above example, one has to consider the magnitude of the increment in addition to the reasons of increment.

3.3. Revision clauses (3214)

Still the parties may agree to the effect that modification may be introduced “where economic circumstances change considerably...” The magnitude of the economic change is very much important in this case than the causes of the change. Because parties are free to agree on and about their terms, the law provides the possibility. How considerable should the economic change be? The determination depends on the specific condition of the time. The underlining element in the determination of the magnitude of the economic change must be the very implication of the change on the provision of the service. We must take considerable change to mean a change which significantly affects the position of the grantee to efficiently carry out the obligations under the contract. Changes in the prices of important raw materials, without which it is impossible to provide the service and the increase of which cannot be reasonably foreseen should entitle the grantee to have revision of the contract. Otherwise, minor economic changes as well as those economic changes that a reasonable business person may foresee must not be grounds of revision.

But Art 3214(1) simply mentions the possibility of revising tariffs without fixing the prices. (Note: do not forget that under Art.3213 (1), in addition to putting the possibility of revising prices, fixation of prices is also achieved). Here, parties therefore should sit down and negotiate the addition of an additional clause in the contract which will possibly be a clause fixing prices. If the parties fail to agree, “the court may fix a tariff” taking in to account the grantee i.e. a tariff ensuring an equitable remuneration to the grantee.(Art 3214/3/). Until now, we have discussed briefly about one form of modification called bilateral (contractual) modification. Now, we will turn to another form of modification called unilateral modification. Concession contracts are arranged to serve the public. They have public policy issue in account. To this end, one of the parties is an administrative authority having a supervisory capacity. For such reasons, administrative authorities have the prerogative of unilaterally modifying the terms of the contract. This prerogative is so valuable that it cannot even be reversed by agreeing to the contrary. (Art. 3216/3/).

By modification, we are referring to making the obligation of the grantee more burdensome. Art.3216/1/) envisages the possibility and also the grounds of doing so. Thus, administrative authorities may impose not only an obligation but even “all the obligations...” that go with the basic undertaking. The imposition of obligations presupposes conditions. Let us see these conditions:

- I. “... Fit for the proper operation...of the service...”.Because administrative authorities are responsible for the good running of the public service, they should make decisions coincident with such a responsibility. One is taking a course of action via Art. 3216 (1)). For example the grantor may make it an obligation on the grantee that the latter control and regulate unreasonable behavior in the vicinity of the institution where service is provided. To this end the grantee may have

the obligation of prohibiting smoking in the institution ran by the grantee. This obligation might be burdensome but still legal.

II. "...fit for the improvement of the service..."- The point is the modification should be inspired by such grand principles a responsible administrative authority should appreciate. Though we cannot talk about the extent in importance of the improvement to the public in general, it is not possible to deny that the improvement should be important to the public and it should not be a ground of abuse.

There are limitations and even prohibitions on this prerogative of unilateral modification. A brief discussion on the limitations and prohibitions will be available here.

1. Only service -related modifications are valid. Art.3217 (1) reads as "Only the clauses concerning the services and its operation may be modified".

Administrative authorities may increase or reduce the service to be operated. They may also impose an extension of the service. In no case however the authorities may impose modifications which actually change the nature or object of the contract. This is an obvious legal remark serving as a safety measure to maintain concessions as they are. If the nature or object is changed they are no more concession contracts. The organizational change in particular is abhorred by the law. In particular such organizational change as substituting a management under state control for concession is prohibited.

Example:

K waterworks is a grantee which has undertaken the duty of providing water to the public with the local water supplies agency herein under called the grantor. Among the duties that the grantee has, providing water to more than ten villages is one. Explicitly, they have also agreed to the effect that the grantee shall undertake the installation of pipes to

forty-four thousand households. Very recently however the grantor is thinking of expanding the extent of the service to additional twenty-thousand households. But the grantor is not sure as to the consequences of this decision. What advise can you give to the grantor? Under a similar setting, assume that the grantor is to modify the service provided by the company to include the task of providing consultation to the municipality on issues of advancing and expanding water supply to the community. What is your opinion on the new plan of the grantor?

2. The nature of the service and the potential of the grantee-the nature of the service and the potential of the grantee are some the considerations that should be made when the administrative authority thinks of modifying the service. When we say the nature of the service we are referring to the fact that the modification should not result in the imposition of completely new service on the grantee. The introduction of novel services in the scene is not legal. The grantee should not be forced to manage new (novel) service nor he be imposed with an obligation which surpasses his potential. Novel services might even be grounds of surpassing the potentialities of the grantee. As such novel services might be burdens on the grantee because they may come up with a special arrangement for their performance. Though possible to say that novel services are recognizable easily, it is possible to hold that the grantor may impose a new service on the grantee under the guise of extension. Even though courts will have a final say on the matter, it is still possible to outlaw such disguised extensions by resorting to the second option i.e. that the services surpass the potentials of the grantee. A service may surpass the potentials of the grantee in different ways. A service may be beyond the capacity of the grantee financially. In this case we say the service cannot be provided by the grantee given its financial capacity. At other times, the grantee may not have the required expertise to carry out the service. This independent treatment of the

ways should not give the image that they are not related. For example, lack of financial capacity may be a ground not to have the required expertise from the market.

3. Financial interest of the grantee- financial benefits that accrue to the grantee as per the concession may not be modified unilaterally by the authorities. On issues involving the interest of the grantee the grantor is not as such free to fix the remuneration unilaterally. In our previous example, would it be against the interest of the grantee if the grantor modifies the contract to the effect that the grantee will provide consultation services to sub-contractors engaged in the construction of water works? Why? Why not?

3.4 Duration of Concession

Concessions are contracts of perpetuity. They are perpetual in nature. Still these arrangements are not unlimited by time, though they cannot limit time.

Under normal course of things, durations are regulated by the contract. Just like any other issue, failure to regulate by the contract will invite in place one legal presumption. The concession will be deemed to have been made for a period of seven years (Art 3227/3/). This is not the end. Failure to renew the concession within two years implies the implicit renewal of the concession for another seven years. The renewal goes on like this for a maximum period not exceeding sixty years.

3.5 Termination of Concession Contracts

By now we suppose you very well know the effects of termination of contracts in general. The effect of termination of concession contracts is different from the rest of contracts. This basically arises from the very

nature and object of the undertaking. As such concession contracts result in the establishment of an organization to effectively provide public service.

Hence, when the contract is terminated a winding up procedure will be the effect. This winding up in turn will entail the “settlement of accounts between the grantee and the authorities. (Art 3229/1/) The rules of winding up are supposed to be stipulated (3229/2/), short of which the provision of the law to that end will be in place. We have two types of laws applicable in this case. One is the law in the civil code. On the other hand the provisions of the commercial code will also be effective. Termination of concession has different reasons and different consequences as well. Let us first consider some causes of termination under the law.

1. Redemption

What is Redemption?

Redemption can be taken to mean **improving of something: the act of saving something or somebody from a declined, dilapidated, or corrupted state and restoring it, him, or her to a better condition.** Normally a contract for concessions is terminated when the stipulated condition materializes or the fixed time arrives. But redemption is one way of terminating concession contract before the normal time of termination. As the definition given above implies, redemption has its own causes. It is only when the conditions that are mentioned as causes materialize that we resort to redemption. In addition to this, redemption must be resorted to only to meet the rationales of redemption.

Simply speaking, redemption is a decision whereby an administrative authority puts an end to the concession before the expiration of its time. (3236/1/) The grantee should not necessarily commit fault redemption to

take place. Rather the condition in which the concession is put necessitates a decision of redemption.

The rationales of redemption might be anything except a motive to "... replace the grantee by another grantee". Otherwise, redemption may take place at any time with the objective of abolishing all in all or partly (reorganizing) the public service. This is a very good indicator of the prerogative of administrative authorities. However the law does not totally put the law in the hands of administrative authorities. It rather fixes a standard that should be observed before deciding to redeem the service. The effect of redemption is winding up. (3237/1/). On the other hand, redemption will result in the payment of compensation the grantee. The payment made as a result of redemption is called redeeming fee.

2. Withdrawal Order

What is envisaged under Art 3228 is a grantee that commits a fault. The rule is the grantee can lose his right only by the order of a court. But if there is an express agreement entrusting this privilege to administrative authorities, then the grantor may order loss of right of the grantee. This order is called withdrawal order. It results in a premature termination of the concession contract. Withdrawal order presupposes the commission of an especially grave fault. This makes the order special from redemption.

We do not know what special fault is. Neither do we know which one is so grave. Courts are those who have the right to determine the nature of the fault and that will decide the loss of right. This being the rule, the law devises a general rule which allows stipulating a clause empowering administrative authorities to order loss of right without going to courts. But can we say that the administrative authorities may order loss of right in a valid way given the volatile nature of the concept of gravity of fault?

The final say as to whether an act constitutes a fault or not and as to whether a fault is grave or not should be determined by a court of law.

3. Sequestration:

is the act or process of legally confiscating somebody's property temporarily until a debt that person owes is paid, a dispute is settled, or a court order obeyed.

Just like the above situation, sequestration presupposes, even though not always, an element of fault on the part of the grantee. The degree of fault is not predetermined in the case of sequestration. Art 3238/1/) is quite indicative of this degree. In the case of loss of right the fault required is a special one in gravity. But Art.3241/1/ shows the fault as being default, incompetence or incapacity. What are the effects of sequestration?

Temporary suspension of rights: The concept of sequestration necessarily envisages a possibility of suspension of rights. The suspension of right is only for a limited time. It is temporary owing to the conditions attached on it. Under our law, sequestration is a measure ordered either to abort a possible interruption in the provision of services as a result of the incapacity of the grantee or sequestration is a punitive measure taken against a defaulting grantee. Though the law is not clear as to the how long the sequestration order will last, it is even ambiguous as to whether the order is temporary in the first place when it is made in lieu of punishment. Can the grantee claim repossession as of right? Who shall determine the arrival of the appropriate time for the cessation of the order of sequestration?

Management of the expenses and works of the grantee: The other effect of sequestration is observable in connection with the management of the work. This issue is related with the first effect i.e. loss of right of the grantee. One of the rights that the grantee will lose as a result of order of sequestration is the right to manage the work. The loss of right by itself has its own effects. Although the ultimate effect is expulsion from the management of the work, because this intrinsically necessitates the fact of managing the work by another person, the grantee may have a legal duty to cover the cost of management. The law still has reservations on the matter. The management expenses are to be covered by the grantee only when the sequestration is ordered in lieu of punishment. Otherwise the expenses are going to be covered by the grantor.

Though the above orders can be associated with the prerogative of administrative authorities, Art.3243 on the other hand tries to strike a balance between the prerogative of administrative authorities and the interest of the grantee. It is a good indicative of the fact that measures taken under Articles 3236-3242 should be in accordance with law. Illegality of the measures as ordered by the grantee entails different consequences:

1. Cancellation of order: the orders of the grantor are not absolute in the sense that they are amenable to change by a court of law. Although the law says “The court may cancel the sanctions of coercion or dissolution, such as measures of sequestration, state control, loss of right or termination, taken by the administrative authorities against the grantee of a public service”, it is not clear as to when the court orders the cancellation. It is however clear that the order should follow an arbitrary and manipulative decision of an administrative authority. Above all, it should follow an illegal order of the same.

2. Order of compensation: the sanctions imposed on the grantee will definitely cause loss to the same. Taking this into account, it is important to force the administrative authorities to make good what they have made bad by their decision. The authorities are obliged to compensate the grantee only if they have injured the interest of the grantee by their fault. Art.3243 (2) reads as follows:

“It may order the authorities to pay compensation for the damage caused to the grantee in consequence of sanctions applied by such authorities *contrary to the law*”.[emphasis]

Summary

Concession contracts are special contracts which require a special legal regime which governs their formation, object, effect and modification. Concessions involve two parties called the grantor and the grantee having two distinct interests in the arrangement. While the grantee seeks to derive remuneration for the service which it renders in the contract, the grantor undertakes to protect the interest of the public by supervising and controlling the grantee.

Even though contracts in general concern the contracting parties, concession contracts are made in a way that they concern a third party. To this end we can say concession contracts are made in the interest of the public.

Because concession contracts are made to endure the effects of time, variation clauses which will make the contract last for long without being broken have the chance to be part of the contractual undertaking. Accordingly variation clauses may be stipulated in the contract to enable the parties to adjust their undertakings in accordance with a changing time. The law also stipulates the possible situations that will warrant modification. Possibilities that will bring the concession to an end

prematurely are envisaged in the law. Sequestration, redemption and loss of right are some of them.

Review Questions

1. Discuss the differences between sequestration and redemption.
2. What are the causes of order of loss of right?
3. Define concession in terms of its elements.
4. What are the reasons behind giving a public service to be run by a grantee?
5. Discuss the consequences of sequestration.
6. Why does the law become stringent when it comes to cases involving the unilateral modification of the contract concerning the financial interest of the grantee?

Chapter IV

Contracts of Public Works

Introduction

Objectives:

At the end of this chapter students will be able to:

- define public works and related issues,
- understand the basics of formation of contracts of public works
- appreciate the way the contracts are performed there by understanding the respective rights and duties of the parties
- concentrating on one aspect of contracts of public works, identify the basic types of construction contracts, consider the parties to such a contract, understand how these contracts are important now a days...

4.1 Definition of Public Works

Art. 3244 (1)

“A contract of public works is a contract whereby a person, the contractor, binds himself in favor of an administrative authority to construct, maintain or repair a public work in consideration of a price”.

Unlike concessions, the specific service to be provided is described in contracts of public works. This undertaking on the part of the contractor is either to construct, maintain or repair a public work. Accordingly, when the undertaking is to simply supply materials for the purpose of carrying out a public work, then the contract will not be that of public works. (3244/2/). Generally contracts relating to the construction and development as well as the maintenance and repairing of buildings, housing, bridges, highways, water supply and sewage disposal facilities, dams and other power supply facilities form part of contracts of public works. What makes the contracts that of public works is their

widespread affective dimension in the sense that their availability, use and administration involve the public at large.

The history of contracts of public works tells us one thing. That the contracts are made not only to enable the construction, maintenance and repair of the works, but also to generate employment prospects to the unemployed section of the society. This was partly the construction history of United States. It is now part of the contemporary history of Ethiopia.

Example:

The locality of J is to have a 31 km all weather road. It accordingly wants to allocate the work to an efficient construction company. In this case the contract to be concluded between J and the competent construction company will be a contract of public works. While J is called the client the company is called the contractor.

Types of Contracts of Public Works

Contracts of public works take different forms. The suitable type is determined based on the nature of the project. The normal type of contract is called measurement contract. Measurement contract goes by other different nomenclatures such as re-measurement contract, build-only contract, unit price contract and the traditional method contract. The other type of contract is the design and build contract. We have also other types of contracts such as management contract, construction management contract, turnkey contract, cost plus fee contract and partnering contract. The predominantly practiced types of contracts are the measurement contracts and the design and build contracts. While measurement contracts are highly practiced in developing countries the design and build contracts are very much practiced in developed countries. The specialization the countries take with this regard is attributable to the nature of each type of contracts. Measurement

contracts are far less sophisticated than design and build contracts. Taken with the capacity of contractors in developing countries, authorities resort to measurement contracts which involve their intensive participation on the project. Let us briefly consider the two types of contracts:

Measurement Contract: under this type of contract the design is made by a person provided for this very purpose usually called a consultant engineer. The construction is carried out by another person. Such type of contract presupposes the impossibility of presenting a full-fledged design during the allocation of the work. The name measurement contract by itself implies the fact the work is measurable.

- a. Design and Build Contract: under this type of contract, the contractor undertakes to make the design and build the work. To this end, the contractor has full obligation to make the design and to build the work. Thus under this type of contract, the obligation is two fold. The degree of obligation is higher under design and build contract. Because of this, the cost of this contract is higher. This does not mean that the owner of the work has no say on the work. Far from it, the contractor must solicit the advice of experts on the work and the interest of the owner of the work on the design. To better express the interest of the owner of the work the same comes up with a conceptual design.

Because of the types of contracts of public works we have, different standards are being devised, drafted and distributed. These new standards try to preserve the contractual balance and distribute responsibility in a delicate way. The prominent standard form contract we have in the world is the Federation International Des Ingenieurs Conseils' (FIDIC) standard. Till now, we have five standard editions of FIDIC. In its kind, FIDIC is a measurement contract.

The FIDIC Contracts Guide is dated 2000 but actually became available mid-2001. It is the official guide to the 3 new FIDIC standard forms of Conditions of Contract dated 1999, viz.:

- Conditions of Contract for Construction (New Red Book)
- Conditions of Contract for Design-Build (New Yellow Book)
- Conditions of Contract for EPC/Turnkey Contracts (Silver Book)

It was decided at an early stage to have just one Guide for all the three New Books, which have been produced as a suite, instead of a separate guide for the individual Books, which was the case for the earlier Red, Yellow and Orange Books. Having one Guide for all three Books enables direct comparison of the differences between the Books, and saves repetition when the wording in the three Books is the same.

As it covers the 3 Books it has been necessary to use abbreviations for the 3 Books. So you will find throughout the Guide the following abbreviations:

- CONS: Conditions of Contract for Construction, which are recommended for building or engineering works where the Employer provides most of the design. However, the works may include some Contractor-designed civil, mechanical, electrical and/or construction works.
- P&DB: Conditions of Contract for Plant and Design-Build, which are recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works. However, the works may include some Employer-designed

works.

- EPCT: Conditions of Contract for EPC'/Turnkey Projects, which may be suitable for the provision on a turnkey basis of a process or power plant, factory, infrastructure or other type of project where (i) a high degree of certainty of final price and completion time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project.

Each of the above 3 New Books comprises three sections, viz.:

- General Conditions, which are intended for inclusion unchanged in any contract, and where the clauses hopefully apply to the great majority of contracts of the relevant type;

- Guidance for the Preparation of the Particular Conditions ('GPPC'), which provides some basic guidance on what (if any) provisions may be appropriate for the contract's Particular. Conditions, including some example texts that are not repeated in the Guide;

- forms for Letter of Tender, Contract Agreement and Dispute Adjudication Agreements.

The General Conditions recognize that provisions in tender documents for a particular project may differ from the standard 'General Conditions', and the intention is that changes and added or deleted provisions should be made in the Particular Conditions.

The Guide is therefore intended to provide general guidance and comment concerning the clauses FIDIC has included in these 3 standard forms, where applicable to indicate why any given

provision has been included, and what its intention was. The Guide also is intended to indicate circumstances where a provision in the General Conditions should not be used, or should be amended, and it includes guidance and sometimes text of how a provision should be modified.

As we go through the Guide, you will see that it also includes a wealth of other useful information - far beyond simple commentary on the standard clauses - for those involved in procurement of construction projects and in preparing and dealing with contract documentation.

FIDIC contract is build by eight documents arranged in a hierarchical order as

- a. The contract agreement
- b. The letter of acceptance
- c. The tender
- d. The conditions of Contract Part II(Particular Conditions)
- e. The conditions of Contract Part I(General Conditions)
- f. The specifications
- g. The Drawings, and
- h. The Priced Bill of Quantities.

If we start at page 4 we see a practical and useful comparison of the main features of the 3 Books.

- Selection of the appropriate Book is critical to the success of a project, and the 'Introduction' on page 5 leads into FIDIC's way of answering the question, "Which Book should be used for my project?" On pages 6-8 are set out a series of questions, the answers to which should indicate which is the appropriate Book to use.

- Pages 9-12 entitled 'Project Procurement' contain a useful commentary on the basic questions of procurement strategy. The commentary indicates the importance of reviewing alternative procurement options before selecting the appropriate strategy for the project in question, and thereafter selecting the appropriate FIDIC Book. It concludes on page 12 with a list of circumstances when FIDIC definitely does not recommend and warns against the use of the EPCT Book (the P&DB Book should normally be used instead).

- Pages 13-16 entitled 'Recommended Procedures' contain a series of charts (taken from the FIDIC publication 'Tendering Procedure' 1994) showing the recommended procedures: for prequalification of tenderers, obtaining tenders, and opening and evaluating tenders. These charts basically apply to tendering for CONS (Red Book) contracts. For P&DB and EPCT contracts the processes are somewhat different as tenderers usually have to submit details of design proposals, which have to be examined and assessed, and the design remains the responsibility of the Contractor.

- Pages 17-20 entitled 'Procurement Documentation' contains an instructive commentary on the documentation required for the

prequalification and tendering procedures. It concludes with some good advice about managing the whole tendering procedure.

- Pages 21-40 contain, first, an example form for the 'Letter of Invitation to Tender', then - more importantly - a set of example forms for the complete 'Instructions to Tenderers' for use with each of the 3 New Books. These example forms are intended as a model to assist those preparing the 'Instructions' for any particular contract.

You will realize by now that this Guide is far more than just a commentary to the Clauses in the New Books. It is, in fact, a rather comprehensive 'procurement manual', giving the 'best recommended practice for the procurement of international construction projects'. Peter Booen liked to call it, a 'procurement-learning book', and, indeed, it gives instruction on nearly everything one should learn and know about procurement of such projects.

All of a sudden, at page 41, the commentary on the Sub-clauses of the FIDIC New Books actually begins! As mentioned, it would have been useful if markers or tabs could have indicated the various sections and Clauses, but perhaps one can attach one's own. The text of the 3 Books, followed by the commentary on each Sub-clause, continues all the way to page 317. Thereafter, pages 318-338, follows the text and commentary on the 'Appendix' to the New Books, i.e. the 'General Conditions of Dispute Adjudication Agreement' and its Annex, the 'Procedural Rules'.

We will return to the commentary, but a brief look at two remaining useful sections of this 'monumental' Guide:

- Pages 339-346 contain a glossary of words and phrases used in the fields of construction, consultancy, engineering and associated activities. One or two of the definitions may be slightly controversial, but the list should prove most useful to many in the industry, particularly newcomers and those from countries where English - as spoken in Europe - is not their home language. These definitions are not necessarily those found in the 'Definitions' at the beginning of the New Books.

- Finally, pages 347-353 contain a useful index to where subjects and terms can be found in the Sub-clauses in the 3 Books, in which Book and in which Sub-clause as well as on which page of the Guide.

Commentary on Sub-Clauses of New Books

Having noted the many valuable other documents contained in this Guide, let us now turn to the main purpose, which is the commentary on the provisions contained in the various Sub-clauses of the New Books. This starts on page 41 and continues until page 317. (Thereafter, the clauses dealing with the General Conditions for the DAB are commented upon on pages 318-338).

When going through the commentary you may notice that some matters are repeated, where a topic relates to different Sub-clauses. Such repetition assists readers studying a particular Sub-clause by avoiding undue cross-referencing.

Clause I General Provisions - pages 41-73

Starting then on page 41, the commentary deals with 'Clause I General Provisions' of the New Books. First you find Sub-clause 'I. 1 Definitions' for the 3 Books - CONS, P&DB and EPCT - printed in their 3 columns at the top of the page. This is followed by the commentary in two columns.

We will not have time to read the commentary now, but, as an example, you may note that the commentary to this Sub-clause says 'In each Book, only those words and expressions which are used many times are defined in this Sub-clause these words and expressions are identified by the use of Capital initial Letters.... Therefore, the Contract Documents should use capital initial letters for words and expressions which are intended to have these defined meanings'. Thus words without capital initial letters have their

natural meaning, and not necessarily the meaning defined in this Sub-clause.

Turning to page 42 we find a list in alphabetical order of all the defined words/expressions used in the 3 Books, together with the Sub-sub-clause where each is defined. (All good contracts start with definitions of the important terms used, so that everyone knows exactly what is meant by each term).

Page 43, showing the text of the 3 Books, clearly indicates where the wording is the same, and where it is not, in the 3 Books. For example, there is no 'Letter of Acceptance' or 'Letter of Tender' in the EPCT Book. On page 44, the text from the Books ceases and the commentary takes over.

The definitions and comments thereon continue until page 56/57. On page 56 you may note that EPCT does not include a definition for 'Unforeseeable', which is a reflection of the extra risk that the Contractor assumes under the EPCT Book. Here the commentary states: "The adjective 'Unforeseeable' is defined in terms which refer to 'an experienced contractor'... The definition does not refer to what the Contractor claims to have foreseen, or to what anyone foresaw, it refers to what was 'reasonably foreseeable' by an experienced contractor'.

All the Sub-clauses of Clause 1 of the Books deal with general matters. Under 'Communications' - 1.3 (a) is noted that 'all communications shall be in writing'. The commentary notes that 'if

electronic transmission is acceptable, the agreed system is to be stated'. Sub-clause 1.5 'Priority of Documents' gives a clear picture of the names of the Contract Documents in the 3 Books, which reflects the typical difference in tendering/procurement between the Books.

We unfortunately have no chance (in this talk) of going through all the Sub-clauses and their commentaries, so we shall look at just a few provisions of particular interest.

Clause 2 Employer - pages 74-80

Clause 2 deals with the duties of the Employer, such as Sub-clause 2.1 - giving access to the Site to the Contractor. Typical of the commentary is that it points out that the Employer "is only required to give the Contractor the 'right' of access to the Site ... it does not entitle the Contractor to an access route suitable for his transport".

New provisions, pages 77-78, are Sub-clause 2.4 'Employer's Financial Arrangements', and Sub clause 2.5 'Employer's Claims'. Regarding 2.4, the commentary notes that the Employer does not have to provide evidence that he can pay unless the Contractor requests such evidence. Normally one would not expect a contractor to demand such evidence. However, the provision is there to protect the Contractor in case there is doubt about an Employer's ability to pay the full Contract Price when, for example, considerable additional work has been ordered, or considerable price escalation - which is refundable to the contractor under the price escalation provisions - has occurred. The commentary points out that if the Employer fails to submit the evidence "Sub clause 16.1 entitles the Contractor to suspend work, or reduce the rate of work, or ultimately to terminate

under Sub-clause 16.2.

Sub-clause 2.5 prescribes a new procedure to be followed by the Employer in case he wishes to claim any payment or extension of a 'guarantee period' from the Contractor.

Clause 3 The Engineer - pages 81-93

Clause 3 - see page 81 - deals with the Engineer's duties for CONS and P&DB. The commentary points out that the Engineer "does not represent the Employer for all purposes - for example, the Engineer is not entitled to amend the Contract. However, he is deemed to act for the Employer". There is no Engineer under EPCT, but there should be an 'Employer's Representative'. When we look at Sub-clause 3.5 - page 89 - we see considerable discussion about the 'fair determination' to be made by the Engineer (or by the Employer under EPCT) when either Party has presented a claim in respect of money or time. This commentary is followed on pages 90 - 93 by a very useful list of all those Sub-clauses under which either Party may have an entitlement to claim. The list is given for CONS and P&DB, but an asterisk marks those that also apply to EPCT.

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Sub-Clause 4.2 Performance Security - pages 97-102

Moving on past page 97 where Sub-clause 4.2 calls for a Performance

Security from the Contractor for full and complete performance of the Works, we find on pages 99 to 102 extensive commentary on such securities, including discussion on the example forms of Performance Security annexed to each GPPC in the Books. Annex C, which may be called a 'conditional demand guarantee', typically would be issued by a bank, and Annex D, which is a 'surety bond', would typically be issued by a credit insurance company.

Sub-Clause 4.12 Unforeseeable Physical Conditions - pages 114-118

Pages 114 to 118 deal with Sub-clause 4.12 'Unforeseeable Physical Conditions'. It is still numbered '12' in honor of the infamous Clause 12 in the Old Red Book dealing with the same subject, which has become known as 'the lawyer's favorite'. On page 115 we can see immediately that CONS and P&DB allow for the occurrence of unforeseeable physical conditions, whereas under EPCT the Contractor has (unless otherwise stated in the Contract) accepted total responsibility for all unforeseen difficulties that may arise. On page 117, we can read in the commentary "The 'physical conditions' are defined widely, so as to include natural sub-surface conditions, natural and artificial physical obstructions, and the presence of chemical pollutants, for example. The physical conditions are those which the Contractor 'encounters on the Site', so they must be a type of condition which is physical in the sense that it is 'encountered'. Climatic conditions on the Site, such as the direct effects of rainfall, are excluded". 'Unforeseeable' is defined as meaning 'not reasonably foreseeable by an experienced contractor by the date for submission of the Tender'.

A new provision in the penultimate paragraph of Sub-clause 4.12

allows the Engineer to review 'whether other physical conditions in similar parts of the Works (if any) were more favorable than could reasonably have been foreseen ...'If so, these costs 'saved' may be deducted from the extra costs reimbursed for unforeseen conditions (but may never be more than the extra costs).

Clause 5 - pages 132-149

Pages 132-136 deal with the unfortunate - but sometimes necessary - arrangement of the 'Nominated Subcontractor' in CONS, Clause 5. We do not reckon with such an arrangement for the other two contracts. For the P&DB and EPCT, we have therefore used Clause 5 for 'design', remembering that for these two contracts the Contractor is responsible for the design, and therefore the requirements for the design must be specified.

Clause 10 Sample Forms - pages 188/203

Moving on to pages 189 bottom/ 190 top we see the commentary provides a 'Sample Form of Taking-Over Certificate' and for 'Taking-Over Certificate for a Section'. On page 203 top we find a (2 line) 'Sample Form of Performance Certificate'.

Clause 12 - pages 205-216

Clause 12 on pages 205-210 deals with 'Measurement and Evaluation' for CONS, as this contract form is for a remeasure-type contract. Such a clause is not normally required for a P&DB or EPCT contract where payment usually follows a 'schedule of payments', so we have used Clause

number 12 pages 211-216 to cover 'Tests after Completion' for these two contracts (which tests are not required for CONS).

Sub-Clause 13.8 Adjustment for Changes in Cost - pages 228-231

Pages 228-231 show and give commentary on Sub-Clause 13.8 'Adjustments for Changes in Cost', which are based on a typical formula for price adjustment versus time from the base date. This applies to CONS and P&DB, but not to EPCT where normally price adjustment will not be permitted.

Clause 20 Claims and DAB -pages 299-338

Moving on to pages 299-302 we find Sub-Clause 20.1 setting out the requirements for claims from the Contractor. Here there is introductory comment followed by the Sub-clause wording. Of note is that the same wording appears in all 3 Books. Pages 303-317 deal with the DAB, followed by 'Amicable Settlement' attempt and then 'Arbitration'.

Pages 318-331 deal with the Appendix to the Books, i.e. 'General Conditions for Dispute Adjudication Agreement' and the relevant commentary, followed on pages 332-338 with the DAB's 'Procedural rules'. One can see on page 333 the difference between the 'Standing DAB' proposed for the majority of CONS contracts, and the 'Ad Hoc DAB' suggested for the majority of P&DB and EPCT contracts.

4.2 Formation of the Contract

Administrative contracts highly involve the public interest. Quality of the service that we have to provide to the public really matters. The inverse relation often times, between quality and price makes attaining quality a difficult task. The basic consideration of our law is quality. That is why under Art. 3246 competition will be waged among skilled persons or among specialized undertakings. Skill and specialization are therefore the ground rules to pick-up possible contractors.

Still, Art 3246 is cognizant enough of the role of competition. In normally operating economy, competition leads to efficiency. It is even possible to reverse the relationship between quality and price. This is so because Art 3246 authorized administrative authorities to “put up for competition the working out of a project of a work...”

The relevance of projects is many folds. On the part of administrative authorities, it helps them to assess the cost that a specific project will consume and the quality of the work resulting from the project.

The possible competitors will be screened out and the authorities will “freely choose the persons whom they admit to take part in the competition.” (3247/3/).

These are only procedures, because simple admission of persons to participate in competition in no way is indicative of the conclusion of the contract. It is one step ahead in the contract. After the preparation of the list, the authorities will announce the winner and allot the contract to such a winner. Reasons of selection need not be explicit. The authorities should allot the contract to the competitor they think fit.

The “fitness” standard we have is a default standard: applicable only in the absence of express undertaking to choose the competitor who is ranged first. Selecting the person who is ranged first corresponds to the

fitness standard because this competitor stood first based on some standards of fitness. The proviso “to whom they think fit” must by itself have a standard. The administrative authorities must have an express standard to adjudge a competitor as fit and unfit. By doing so, the authorities will comply with one of the constitutional principle called transparency. This is a logical continuation of Art 3248 under which administrative authorities are obliged to be strictly bound to respect the rules of the competition made by them.

Try to justify how Art 3249, second sentence, is a logical continuation of Art 3248?

The contract will be concluded only after application of Art. 3249.

Contract Procurement Alternatives

The process of selecting the contractor and entering into an arrangement with the same is tantamount to procurement of work thereby necessitating as the case may be procurement by open bidding, restricted tendering or direct procurement.

4.3 Performance of the Contract

The normal performance of contract of public works involves three elements on the part of both parties. Generally, direction of work, payment of price and acceptance of work are the elements. Some correspond to administrative authorities and others to the contractor. Let us begin with the first.

4.3.1 Rights of Administrative Authorities

In aggregate the basic rights take two shapes. One is the right to direct the work. The other is the right to supervise the contractor. Art. 3250 (1)

establishes this right of supervision as “The administrative authorities may supervise the performance of the works”.

As to the direction right, Art 3250 (2) says” they may also prescribe to the contractor the manner of performance of his work”.

4.3.1.1 Right to Supervise

This right involves two things on the part of the contractor and also the administrative authorities. Administrative authorities may directly supervise the works of the contractor. To this end, they may enter the yards at any time and require the contractor the information necessary for their control. (3251 (1)) Authorities may also make regulations that ensure good order and security in the yards.

The consequent obligations on the contractor are observing the regulations made and furnishing the necessary information to administrative authorities. (3251/2/).

These arrangements are mandatory to the extent that no one party to the contract may agree to the contrary.

The supervisory role of administrative authorities is not limited to supervise only works and yards but also the personnel of the undertaking. In addition to this, materials may also be supervised. With relation to personnel, the authorities may require that employees be changed or dismissed. The quality of materials shall also be controlled by administrative authorities.

4.3.1.2 Right to Direct

This right to direct involves regulating the development of the works and prescribing to the contractor the manner of performance of such works. This involves the how of the work.

To this end, administrative authorities may give plans and models. Not only this, administrative authorities have the right to arrange the rhythm of works. This is to mean that the authorities may fix the period of time for the performance of the work. A general period may be fixed to this end. Or special periods for each work might still be fixed.

Fixing a general period by administrative authorities entails another responsibility of “specifying the time at which the works shall begin.”

But arranging the rhythm of the work is not only about fixing general and special periods. It is also about “regulating the order, sequence and the rhythm of the works within the general period laid down in the contract”.

On default of fixed periods indicating the starting point, the law provides us with one:

A/ periods shall run from the date of notification of the contract.

(See Art. 3254(1) cum 3249).

B/ periods shall run from the materialization of a condition.

4.3.1.3 Right to Demolish (3256)

Administrative authorities have this right of ordering the demolition and the reconstruction of any defective work at the expense of the contractor. This is usually the case in contracts of measurement or re-measurement where the contractor agrees only to build while the administrative authorities undertake to provide the design and model of the work.

Otherwise, the situation is rare. We can raise questions concerning the validity of a demolition order. Can the authorities order the demolition of a work without any condition? Who should decide whether a work is defective or not? What type of defect justifies demolition? Does the magnitude have any contribution to the decision the authorities make?

4.3.2 Rights & Duties of the Contractor

It will not be a hard remark to say contractors have very limited right with relation to administrative authorities. Even the way in which the article is devised to confer rights on contractors is negative. It magnifies than ever the administrative prerogatives of administrative authorities.

As such, contractors are prohibited from demanding compensation from administrative authorities save for the fault that the latter might commit. (3259(2)).

What rights do contractors have? Art 3259 gives them the right to demand compensation, but only after observing certain legal considerations.

Under normal course of things compensation cannot be demanded as of right (see Art.3259 (1)) Compensation however is due when:

A/ damage is caused due to the fault of administrative authorities by either making abusive requirements or by postponing the performance of the contract (3259(2)). Abusive requirements show the malicious intent of administrative authorities. Postponing the performance of the contract makes things more burdensome on the contractor.

Contractors in need of compensation must establish many things.

I. The existence of damage: to get compensation, proving injury to a legitimate interest is a requirement.

II. The existence of fault: the contractor must prove the existence of fault on the part of the authorities. The usual types of faults are those related with abuse of power.

III. Violation of the contract: the terms of the contract must be violated to get compensation from the authorities.

B/ damage is caused, regardless of fault, by the aggravation of the normal conditions of performance of the contract. (3259(3)) The first rule is partly based on the principle that no one should benefit from his/her fault. This one is based on the idea that persons should make good what they have made bad. When the administrative authorities make the performance of the contract more burdensome, they are those which should make the ways of performing the contract suitable to the contractor.

. When parties enter in to a contract, they foresee expenses and costs. Parties make a risk assessment plan and agree or disagree to enter in to a venture. When a party is forced to bear what he/she has not foreseen before, this will completely ruin the plan of such a party. It will also make parties skeptical of the system there by to withdraw from engaging in similar activities in the future. It is because of this and other reasons the law protects from unreasonable shift in the balance of the contract as sponsored the authorities.

4.3.3 Payment: Modalities and Time

Payment is performance or only part of it. While generally it is indicative of the conclusive performance of the contract sometimes, at times like this, payment is only the performance. When we started discussing

about contract of public works, we defined the same under Art.3244 making reference to “price”. Contract of public works is a contract in “consideration of a price.” Specifically the contractor binds himself in favor of administrative authorities so that the latter will pay him a price. Thus, under our current discussion, we will try to see how this issue is regulated.

4.3.3.1 Modalities

Different types of payment are recognized. We have contract with a fixed price under which contractors will get their payment in a lump sum. (3261) On the other hand, we have contract with series of prices. Here without determining the extent of the work, price is fixed based on the different types of work that the contract envisages. We have different prices for different works. (3262).

It is also possible to determine the extent of the final work and determine the services of prices applicable to each kind of work. The type of contracts determines the form of payment that a system follows. In the case of measurement contract for example, lump sum payment is unthinkable. The construction cost of the project is disbursed on the basis of each work accomplished. The basis of payment is unit rate as determined by the contract. The price will be multiplied by the quantity of the work. The total amount of the work during the allocation of the contract may increase or decrease during the actual accomplishment of the work. The price of the work is payable periodically usually on a monthly basis. Payment is made after the measurement made by the architect or the concerned expert. The payment is registered on a document called certificate of payment. Arithmetic errors, if any, may be corrected in the next payment. That is why measurement contract is also called re-measurement contract. The total cost of the project can be

known only after the completion of the work. What we have to know however is the truism that Ethiopian law acknowledges both forms of payment. Between the extremes, parties have the freedom to adhere to anyone form. It is however advisable parties agree to one of the forms of payment depending on the exigencies of the project and other rational considerations which relate to the advantages and disadvantages of each form of payment.

Do you see the difference between Art 3262 and Art 3263? Can you appreciate the relevance of each? Which one is more important? On what basis?

Parties are given the mandate to fix by their contracts the manner in which payment of price is to be undertaken. That is what we can gather from the provisions that we previously considered and others which generally relate to the manner of effecting payment.

The freedom of parties on the modality of effecting payment is not without any control. Art 3267 comes up with a standard. No contract will arrange a clause of deferred payment. Even so, it can be only by bills of exchange or by annual installments.

4.3.3.2 Time of Payment

The time fixed by parties and conditions fixed by them as well are crucial to determine time of payment. Art.3268 (1) says “where the ascertainment of the services performed constitutes a preliminary condition for the determination of the price, such ascertainment shall be made within the periods specified in the contract”.

One thing we have to know here is we cannot fix the time of payment without first fixing what is going to be paid. What if the contract does not regulate such issues? Art 3268(2) raises more questions than it answers. Let us see this.

We can imagine two defaults:

1/ when the contract generally defaults to regulate the issue under Art.3268 (1).

2/ when one of the parties defaults to undertake the requirements envisaged under Art.3268 (1) even when the contract is not defaulting.

4.3.4 Acceptance of Work

As the contractor has a right to payment, the administrative authorities have the right of taking possession of the work done.

4.3.4.1 What is Acceptance?

Acceptance is not merely taking possession of the work. Rather it is the delivery of the work. Acceptance is “a joint ascertainment of the works made immediately after the completion of the works”. As such it is an examination of the works by the contractor and the administrative authorities.

Generally we have two types of acceptance- Provisional acceptance and final acceptance. Even though both involve in the ascertainment of the works, there are areas of departure between the two ways of acceptance.

2. Provisional Acceptance

This involves the ascertainment of the works both by the contractor and the authorities. What makes provisional acceptance special, among other things, is that it is made under reservation. Though it involves the effective taking of possession, the acceptance is made under reservation.

A/ Effects

On the other hand, the effects of provisional acceptance are different from that of final acceptance. The effects of provisional acceptance are two fold. In the first place provisional acceptance does not imply the exoneration of the contractor from any defect (Art 3275(1)).In the second

place, it shall amount to a tacit acceptance of the modifications there under.(3275)2(2).

More informally, provisional acceptance marks the beginning of the period of warrant whose expiry marks the final acceptance of the work. (3275(3)).

B/ Risks

Provisional acceptance is a critical decision which will help us determine transfer of risk.

What is the rule?

Art. 1758 (1) reads: “The debtor bound to deliver a thing shall bear the risk of loss of or damage to such thing (until delivery) is made in accordance with the contract”.

Art 3276 (1) is not different from Art 1758 (1) in stating the rule. But one thing you should question is “is it only when the loss or damage results from force majeure that the contractor will bear the costs? Why? Why not?”

Sticking to Art 3276 (1) leads us to an affirmative determination. But one can question the soundness of Art 3276 (1) taken lightly. If the contractor bears the damage or loss caused by force majeure before the making of provisional acceptance, even for a stronger reason he can bear the damage caused regardless of the cause(i.e. for damages caused while he was able to avoid or defer them).

3. Final Acceptance

This is the definite appropriation of the works after ascertaining that the contractor has performed his obligations in their entirety (Art. 3279(1)).

The definiteness of the appropriation strengthens this assertion. In addition, the effect of final acceptance is evidence to the validity of the assertion we made.

Final acceptance involves both parties in the ascertaining procedure. Art.3279 is strict in this sense. It requires the joint presence of the parties and the making of record as well. Therefore, the issue is clear with regard to the absence of the administrative authorities during the Just like any other rule of payment on the event of contestation or doubt as to the creditor (see Art.1744), Art 3280(1) authorizes the contractor to require the court to ascertain that the works are in a condition to be accepted.

Unlike the situation under Art.1744, ascertainment by the court will not automatically result in a conclusive acceptance of the work. If a period of warranty is fixed, the expiration of such period marks the final acceptance of the work. Otherwise, final acceptance will be deemed to have taken place when the day fixed by the court arrives.

4.3.4.2 Effect of Acceptance (Art.3281)

Final acceptance relieves the contractor from his obligation of maintaining the works. Before the final acceptance of the work, the contractor has the obligation of maintaining the work. What is this obligation? This obligation refers to the fact of preserving the work in a purposive manner. Before delivering the work, the contractor must ascertain that the work is fit for the purpose it is made. He/she can meet this end if the same can maintain the work in every manner. The acceptance will irrevocably place the works in the hands of administrative authorities. The same will put such an obligation in the hands of the

authorities. It will also entitle the contractor to payments that are due to him but still not made waiting the arrival of this date.

4.4 Revision of Contract

4.4.1 Unilateral Modification: The Contractor

The right to unilaterally modify the contract is not a privilege operative in favor of the contractor. In the strict sense our civil code does not provide such a right i.e. a right to unilaterally modify a contract to the contractor. Even under normal course of things, a contract can be varied only by a court of law (Art 1763). What we have under Art 3268 is not unilateral modification of the contract. Rather the contractual right extends only to *requiring* the revision of the contract. Even this right of requiring revision is conditional upon other issues mentioned under Art. 3286(1). Hence, the contractor should encounter material difficulties of an absolutely abnormal nature, unforeseeable at the time of the contract. What makes the modification unilateral probably is the fact that the administrative authorities are placed in a situation they cannot question the validity of the request. If the conditions mentioned under 3286(1) are fulfilled, Art.3286 (2) obliges administrative authorities to bear part of the exceptional expenses. However, administrative authorities have one choice -preferring to cancel the contract.

If the difficulty is not that much material or of an abnormal nature i.e. if it simply compels the contractor to perform a supplementary work not mentioned in the contract, in this case he may initiate the work after having obtained a requisition order. However, if the supplementary work is very necessary in the absolute sense, and of an urgent nature, the contractor should initiate the work without a requisition order. In this

case, administrative authorities will not have the chance of canceling the contract. They would rather simply compensate the contractor.

Example

The Ministry of Defense has entered in to a contract with a domestic construction company to construct a military complex which incidentally involves the residents of over twelve hundred military officers. After the completion of the significant portion of the complex, the contractor came across a silly still critical omission in the building- the complex has no stairs. Because the contract was a build- only contract, the design was made by another contractor to whom the contractor at hand has no legal relation. And it was in the design that the stairs were missing. Now the contractor wants to know your position as to the possibility of constructing the stairs as of self help. What will be your position?

4.4.2. Unilateral Modification: The administrative Authorities

This right of administrative authorities makes them special parties to a contractual arrangement. This is a prerogative in two senses.

1. “During the currency of the contract... the administrative authorities may impose unilaterally upon the contractor changes in the original conditions of the contract” (Art 3283 (1)). They may even order the contractor to perform works not even mentioned in the contract. There however reservations held by the law with this respect. Accordingly:
 - 1.1. the changes under Art.3283(1) may affect only the provisions which affect the arrangement of the public works,
 - 1.2. those changes under Art.3283(1) may not affect the financial position of the contractor,

- 1.3. new works under Art.3284 involve payment of compensation and they are conditioned on the same
 - 1.4. new works may not imply imposing tasks which completely differ in terms of object from the work mentioned in the contract,
 - 1.5. new works may not dictate new ways of performing them,
 - 1.6. Unilateral revisions may entitle the contractor to cancel the contract “where the increase or reduction of the work required by the administrative authorities involves a variation of more than one-sixth of the cost mentioned in the contract.”
2. The imposition by the administrative authorities is irrevocable even by an otherwise stipulation in a contract. The contracting parties may not agree to the effect that the administrative authority cannot unilaterally modify the contract.

4.4.3 **Revision by a Court**

Courts may vary a contract based on different considerations. For equity considerations variations may be made. On the other hand, courts are entitled to vary administrative contracts. This is an exception to the rule under Art 1764(1). Thus, a contract cannot be varied simply because it has become more onerous. The law holds “A contract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he foresaw.” Furthermore, the law is explicit with regard to the limitations that we have against courts with relation to contracts. As such courts shall not make contracts for parties under the guise of variation. The effect of economic changes must be regulated by the parties and not by courts. However, under Art.1767 (1) an administrative

contract may be varied even when it is made more onerous than before. But, the court may vary the contract only when the contract was made onerous because of an official decision. This “official decision” should not be any type of official decision. For sure, an official decision is a measure taken by a grant of compensation. Does this mean that the official decision may not entitle the court to vary the contract? See Article 1767 (2) with Art 3193 (1) and Art 1767 (1) with Art.3193 (1). It is wise to consider the reference Art. 1767(2) makes to Articles 3191-3193. These three articles further elaborate on the exception under Art.1767. Read the articles and discuss whether they return us back to the rule under Art.1764?

4.4 Non-performance of Contracts of Public Works

Effects of Non-Performance

The general effects of non-performance are dealt with when we discussed generally “non performance of administrative contracts”. Non-performance of contract of public works occurs when parties default in different ways. The section dealing with non-performance in our civil code magnifies the contractor as the only defaulting party. But because of the nature of the obligation that the contractor assumes, a special section for non-performance is important. Because the special section dealing with administrative contracts does not regulate the default on the part of authorities, it does not mean that the law does not regulate them generally. The presumption is the obligations assumed on their part is not that special which will not require special regulation other than the one we have under the general part. So it is reasonable to avoid any confusion that the code invites you in. Non-performance ensues when the contractor fails to undertake the obligations that he assumed under the contract. Basically, the obligation of the contractor is to construct, maintain or repair a public work. If he/she fails to do one of the things

he undertook to do under the contract, we say there is non-performance. Non-performance has two special consequences. In the first place it results in the state control of the project. On the other hand, it may result in re-allocation of the work to another contractor. Let us briefly see these two effects.

- I. State Control-This is a process where works began by a contractor are placed under the domain of the state. It is possible to infer this from Art 3288 (1) which says partly "... declaration of state control may be made where the contractor fails to perform his obligation."

A state control is on the other hand a decision, next to being a process. So it is a declaration to the effect that contract of public works shall become under state control. Mostly order of state control presupposes failure to carry out obligations as a result of lack of resource. Inadequate resource to carry out the works within a given time is a ground for authorities to assume the full responsibility of carrying out the work.

What comes under state control is the project. The ground of making the declaration on the other hand is the non-performance evidenced by the contractor.

Declaration of state control must be made after putting the contractor in default. After ten day's of summoning the contractor to perform his obligations, administrative authorities may make the declaration.

The effects of state control are two fold. From the start, the declaration will temporarily deprive the contractor of contract. What does this mean? The effect of depriving one's contract may even be prohibition of exercising one's rights in a contract. Is this fair?

On the other hand, the declaration will force the contractor to bear the expenses of control. What possible expenses can you guess? Such

expenses may include costs of administering the remaining work, cost of preservation or any other related cost.

State control is not permanent. Especially Art.3289 (1) which explains on the effects of state control tries to tell us that the declaration is temporary. This nature however is conditional on one thing:

“[Showing] that he has the necessary means to resume the works and to carry them out to completion.” (Art 3290).

Under such a condition, the contractor may be allowed to resume the work. Such a decision by the administrative authority is called an order of *cessation*.

- II. The Allocation -The other effect of non-performance is re-allocation. As the name itself implies, reallocation is giving the work away to other person than the contractor. As to Art 3291, reallocation presupposes different conditions. One such prerequisite is the foreseeability of the matter. This is to mean that the contract should expressly foresee the possibility of reallocating the contract .Foreseeability may involve the situation in which the authorities are in. For example, the conditions may convince the authorities that they should not put the contract under state control. This again may be based on a cost-benefit analysis that a rational authority will make. Secondly, reallocation presupposes cancellation. It is only contract that is cancelled that can be reallocated (Art. 3291 (1)).

Another condition which is worth considering is the “new contractor” requirement. The purpose of reallocation is to allow new contractors to take the work and act accordingly. Reallocation should not be in favor of

the old contractor. The possibility of participation in the reallocation is barred by Art 3291 (1).

Reallocation may be made in two ways. Auction may be one option. Agreement on the other hand is also possible to effect reallocation. Such a procedure has a different consequence than that of state control. Reallocation affects the arrangement in a permanent way, while state control has a temporary effect. In terms of effect, reallocation imposes a burden of bearing consequences, while state control involves costs and risks (Art 3291(2)). We have two consequences (burdens. One is the burden of bearing the consequences of the transaction. But which transaction is the provision referring to? As you might observe from Art. 3291 (1), administrative authorities will enter into a transaction when they decide to reallocate the contract. They are forced to reallocate either by auction or private arrangement. Such transactions have consequences as well as costs. The code prefers consequences rather than costs here. Do not forget that consequences are wider than costs. Can you show this? Among others, consequences may mean those side effects that the new contract will bring about.

Delay of Construction and Its Effect

Construction contracts stand on three pillars namely quality, price and time. Unless the contract proceeds compromising the disparities among these pillars, it will be terminated somewhere in point of time. FIDIC contract has devised its own way to compromise the possible disparities. As such a mechanism of evaluating the problems that may ensue and proposing a plan that enables increase or decrease in time and price are some of the solutions that FIDIC has come up with. Concerning time, if the time fixed to conclude the project lapses, the contractor shall pay a liquated damage to the owner of the work.

Summary

Contracts of public works are undertaken by administrative authorities mainly to provide the public with important utilities such as roads, dams, power supplies, bridges and houses.

While the provision of these utilities underscores the necessity of their construction, other objectives such as provision employment prospects on the part of governments are taken as important parts.

Contracts of public works involve at least two parties. namely the grantee and the grantor. Though the two enter into an arrangement, they hardly represent themselves. As such contracts of public works are arranged to benefit the public. The parties agree in the interest of a third party.

Because of this, the law takes a special precaution in regulating the actions of those involved in the contract.

The predominant type of contracts of public works is construction contract. Again construction contracts take different forms each form highly associated with the economic status of the nations practicing it.

The formation of contracts of public works involves the procurement of work whereby the application of Proclamation No. 430/2005 is important. Depending on the law open bidding, restricted tendering and direct procurement are some of the modes of procurement.

The parties involved in the contract have their own respective roles in the form of rights and duties. While the authorities predominantly have a supervisory function, the contractor plays a functional role.

Payment, revision and cancellation are considered as some of the effects of contracts of public works.

Review Questions

1. What does a public work mean? Discuss by mentioning all the possible elements of the same.
2. Why do we give the responsibility of supervising a public work to the government?

3. How does the FIDIC contract substantiate the Ethiopian Civil Code?
4. What are the effects of non-performance of contracts of public works?
5. Analyze the concept of state control and the causes of the same.
6. What is measurement contract? Why is it called a measurement contract?
7. Explain the difference between measurement contract and design and build contract.

CHAPTER V

Arbitration of Administrative Contracts

Introduction

Unit objectives

At the end of this chapter, students will be able to:

- appreciate rules of arbitration and their effect on administrative contracts
- Understand the difficulties surrounding the arbitration of administrative contracts.
- Recommend, based on laws a measures to solve the problem of arbitration of administrative contracts.
- See the crux of the problem in relation to arbitration of administrative contracts.

5.1 Arbitration in general

Arbitration is one of the alternative dispute resolution mechanisms that we have. When we say it is part of the Alternative Dispute Resolution (ADR) mechanism, we do not forgett the controversy behind arbitration and the categorization of the same as Alternative Dispute Resolution mechanism. Some, taking arbitration by its outcome, resist accepting that it is really an alternative since it does not give the chance to the parties as to its execution. In this sense, we are saying that arbitration is one of the Alternative Dispute Resolution mechanisms by taking the fact that it is optional for the parties whether to take their case to a judge appointed by the state or judge appointed by them. Arbitration is reference of a dispute to an impartial person or persons, called arbitrators, for a decision or award based on evidence and arguments presented by the disputants. The parties involved usually agree to resort

to arbitration in lieu of court proceedings to resolve an existing dispute or any grievance that may arise between them. Arbitration may sometimes be compelled by law, particularly in connection with labor disputes involving public employees or employees of private companies invested with a *public interest, such as utilities or railroads*. *Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of third party (the neutral) acting in accordance with these rules.*

In the first place, arbitration is a contract by which parties decide to resolve their disputes by a person duly appointed by them. Despite litigation, arbitration has different advantages. Arbitration is more flexible and adaptable as well as quicker and more efficient than litigation.

Economically, ADR mechanisms including arbitration significantly reduce case congestion in courts. Out of court resolution of disputes reduces burdens both of courts as well as judges'. Hence arbitration saves the state's resources as well as the judge's time.

The economic and social implication of arbitration makes it more preferable than litigation. Especially in Ethiopia, the experience is native so it needs no further domestication. The society's way of life i.e. its communal nature makes ADR mechanisms preferable than litigation. In communal societies where the face-saving practice has a wide spread acceptance, litigation has undesired consequences. Here the group is more important and indeed fundamental than the individual. The group is the refuge of the individual and it is protected at any cost. *Conciliation plays a very important part in African law since the community life and group isolation give rise to a need for solidarity. As a result Africans*

always seek unanimity through dialogue, since only conciliation can put an end to disputes.

A society with a face –saving value wants to solve disputes in a win-win condition. The win-lose arrangement has negative implication on the status quo ante of such a society. From this point of view, ADR should be harnessed. . The recourse to legal actors and proceedings is costly emotionally debilitating, and potentially counter productive .It is to meant that now it is a common knowledge that existing justice system is not able to cope up with the ever increasing burden of civil and criminal litigation . The problem is not of a load alone. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. There is growing awareness that in the bulk of cases court action is not appropriate recourse for seeking justice. Alternative Dispute Resolution mechanism is a process where disputes are settled with the assistance of a neutral third party generally of parties own choice: where the neutral is generally familiar with the nature of the dispute and the context in which such a dispute normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses: where a decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities. In substance the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in relationship of the parties which has given rise to that dispute.

5.2. Arbitration of Administrative Contracts

Arbitrability: What is it?

Fortunately or unfortunately all matters submitted to arbitration may not be arbitrated. There is a further distinction between matters that cannot be arbitrated. This will lead us to one other discussion in arbitration called the arbitrability of matters.

Matters amenable to arbitration are called arbitrable matters and those not amenable as non-arbitrable matters. What do you think is the importance of such distinction?

The concept of arbitrability is in effect a public policy limitation upon the scope of arbitration as a method of setting disputes. Each country may decide, in accordance with its own public policy considerations, which matters may be settled by arbitration and which may not. Often the arbitration clause is ineffective since it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.

Arbitration purely is a policy consideration. It is however also a private consideration. The law may clearly prohibit arbitration of a matter. The contract of arbitration might even do the same. Even when the contract authorizes arbitration, if the law prohibits arbitration, the same may not take effect.

_What is the position of Ethiopian law from this angle?

No matter how careful you might be in drafting contracts you cannot totally avoid disputes especially in complex contractual undertakings. In such cases, the questions, whether or not we may submit the dispute to

an arbitral tribunal? Can we allot a place in the contract to regulate its arbitration? Are there special conditions which necessitate extra-judicial adjudication of administrative contracts? are of paramount importance.

The next discussion will therefore be devoted to consider the above questions.

In Ethiopia there are legal documents appropriate to consider the legality of the arbitration of administrative contracts. One is the Civil Code and the other is the Civil Procedure Code. Finally we have Proclamation No. 430/2005.

According to the civil procedure code, administrative contracts are not amenable to arbitration. Article 315(2) reads: “No arbitration may take place in relation to administrative contracts as defined in article 3132 of the civil code or in other case where it is prohibited by law in the civil procedure code”. But nothing to that effect or even similar to that is stated in anyone of Articles 3325-3346 of the civil code dealing with arbitration in general.

Article 315(4) of the civil procedure code further says “nothing in this chapter shall affect the provisions of Articles 3325 – 3346 of the civil code”.

Confusingly, those provisions embodied in Articles 3325 -3346 do not mention anything about the arbitrability of administrative contracts. To be clear Articles 3325 – 3346 are silent on the issue. If so, what is the implication of the reference made to them by the civil procedure code? Does it mean that administrative contracts are not subject to arbitration because nothing allowing their arbitration is said in the civil code

provisions? Or does it mean that the silence in the law is acceptance of their arbitrability? Please consider this excerpt from **THE FORMATION, CONTENT AND EFFECT OF AN ARBITRAL SUBMISSION UNDER ETHIOIAN LAW** (*Bezzawork Shimelash, Journal of Ethiopian Law, Vol. XVII, 1994*)

The submission must specify which dispute is referred to arbitration. Specially where the submission related to future dispute (where the dispute was not known at the time of making the submission) the law provides that “this shall not be valid unless it concerns disputes which flow from a contract or other specific legal obligation” (Art. 3328 of the C. C.).

The intention of the parties whether they have chosen a “narrow arbitration clause” or a “broad arbitration clause” is determined by the words they have used in the submission. A formation such as “a dispute arising under the contract” is held to be a narrow one while “all disputes arising out of the contract or in connection with it” is considered a broad one. If a case is brought in Ethiopia, there is little doubt that the courts will follow similar lines because they will enforce an arbitral submission only when they are convinced that the dispute is “covered by the submission” (Art, 3344 C. C).

In one case the arbitrator assumed jurisdiction on a formulation that reads “If a difference arises as to the amount of any loss or damage such difference shall... (Be settled by arbitration).” But the Supreme Court revised the Award on the ground that the dispute relating to liability of the insurer was not covered by the submission.

As stated above, specifying a dispute is important but, the more important point (that may well affect the legality of the arbitration process) is that the dispute must be capable of settlement by arbitration. The Civil procedure

code (Art. 315) in which this principle is strangely laid down provides: “No arbitration may take place in relation to administrative contracts as defined in Art.3132 of the civil code or in any other case where it is prohibited by law.”

If this provision had been placed in the civil code rather than in the civil procedure code or alternatively, or if the civil code had similar provision, no one would have dared to make an issue out of it. But because of this stated situation, the question of whether or not administrative contracts are capable of settlement by arbitration has continued to be a subject of much controversy.

** * * * **

Even though establishing a principle regarding capacity of persons is not within the domain of procedure law, our civil procedure code provides thus: “No person shall submit a right to arbitration unless he is capable under the law of disposing of such right.” (Art. 315 of the civil Pr. C.). As stated earlier, even here the code uses the phrase ‘unless he is capable under the law’ implying that capacity is governed by other substantive laws. Accordingly, the principle regarding the capacity of persons to arbitrate as laid down in the civil code reads: “The capacity to dispose of a right without consideration shall be required for the sub-mission to arbitration of a dispute concerning such right.” (Art. 3326 of the C. C)

Where the party to an arbitral agreement is a physical person, the basic requirement that he must be capable, i.e. free from all disabilities is obvious. Where the party is a juridical person, such person must be endowed with a legal personality. This too is obvious. Rather, we are concerned, here, with the content of the additional requirement, i.e. “the capacity to dispose of a right without consideration.”

It has been said earlier that arbitral agreements are not ordinary agreements. Rather they are agreements that subject parties to different and private type of dispute settlement process. They “may lead to a solution of the dispute other than that which would be given by the courts?”(R. David, Arbitration in P. 174.). Hence, it is necessary that the parties must have the power to dispose of the right in question, in the words of the Amharic version, “without price”.

Where the parties are acting on behalf of other persons, either physical or juridical, then, a special authority to settle a dispute by arbitration is required. That special authority is derived from the principal who has the necessary capacity. Where the principal is a juridical person, such as a business organization, it is derived from its governing body, i.e. the board of directors.

So much for capacity at the level of physical persons and business organizations - It is at the level of public bodies such as the state, public administrative authorities and public enterprises that more controversial points could be expected to arise, considering the fact that the interest of the public is involved in their transactions. So, the question is: do these bodies have the capacity to make arbitral agreements? If so, to what extent?

Let us first take the Ethiopian state. In the civil code, it is stated that the state is “regarded by law as a person” and that as such it has “all the rights which are consistent with its nature.” (Art. 394 C. C). If the distinction is not to be stressed between the state and the government, we see that the Ethiopian Government, for instance in a petroleum agreement, is allowed to submit a dispute to arbitration. (Petroleum Operations Proclamation, No. 295/1986, Art. 25). We also see that the state, as one of the parties in a joint venture agreement, can settle

disputes by arbitration (Joint venture council of state special Decree, No 11/1989, 4(1), 36.). Other than these, we have not found a general provision that expressly allows or expressly prohibits the state from making an arbitral agreement. In these circumstances, the easier answer would have been to say that the state does not have the capacity to submit to arbitration. But that would be unrealistic. The state is the source of all rights and obligations and of all laws (including the provision on capacity). It is also the trustee of all public property. It follows, therefore, that as long as the right which is to be the subject of arbitration belongs to that state, and not to someone else, i.e. individual citizens or groups, it can be said that the state has the capacity to make arbitral agreements.

Regarding the capacity of public authorities and public enterprises, after making a short survey of various legislations, we find amongst them three categories: Those with no express power to submit to arbitration, those with limited power and those with express power to do so.

Public authorities such as the Ethiopian Science and Technology Commission (Proclamation No.62/1975.) are conferred with such powers like entering into contracts, suing and being sued, pledging and mortgaging property. The power to submit to arbitration is not expressly given to them. The same is true for public enterprises like the Agricultural Inputs Supply Corporation (Proclamation No. 269/1984). On the other hand, we see that public enterprises like the Ethiopian Domestic Distribution Corporation and the Ethiopian Import-Export corporation have the power to settle disputes out of court (Presumably this includes arbitration) only with the permission of their supervising minister (Legal Notice No. 104/1987. Art.12 (3) and Legal Notice No. 14/1975 and public Enterprises Regulation No. 5/1975, Art 7(2)). Then there are many public authorities which are expressly empowered to submit disputes to arbitration like the Civil Aviation or the National Water Resources

Commission which are empowered to settle disputes out of court (Proclamation No. 111/1977, Art. 8(18) Proclamation No. 217/1981, Art. 8(16)). Public enterprises like the Blue Nile Construction Enterprise (Proclamation No. 234/1982, Art. 10(2) (C)) are also given similar power. The conclusion to be made is, therefore that in the case of public authorities and public enterprises, the power to submit a dispute to arbitration is not to be presumed and that they need either an express power, or in the case of some public enterprises, special permission to do so.

On top of that, the special nature of administrative contracts requires a clear answer to the arbitration question. In addition to the advantages we raised in connection with ADR mechanisms, some administrative contracts themselves are good indicators justifying this.

Administrative contracts that involve foreigners as parties are good examples here. To this end, we may consider some basic issues.

- Domestic courts might not be reliable in the eyes of foreign investors. This suspicion in the hearts of foreign investors requires a special form which settles their doubt and hence independent dispute settlement organs. In international investment ventures devising systems of such kind is normal. We thus have the International Chamber of Commerce (ICC). ICC is perhaps best known for its role in promoting and administering international arbitration as a means to resolve disputes arising under international contracts. It is one of the world's leading institutions in providing international dispute resolution services, together with the American Arbitration Association, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the Stockholm Chamber of Commerce.

It is common for international commercial contracts to provide for an agreed means of resolving any disputes that may arise, and the ICC is one of leading institutions for administering international arbitration. The ICC's dispute resolution services also include ADR procedures such as mediation and expert determinations. That is why in its preamble, the ICC provides:

- To promote investment, we also have such organs as MIGA (Multilateral Investment Guarantee Agency) .The basic objective of MIGA is protecting investors from domestic political realities. The Multilateral Investment Guarantee Agency (MIGA), established in 1988, is designed to encourage foreign investment by insuring investors against loss from noncommercial risks, such as war and civil disturbances.

-International donors and organizations may make it a condition to extend assistance or loan as the case may be only when arbitration is possible. In effect the dispute settlement mechanism may be stipulated or dictated by the said organizations. In such cases ignoring the stipulations will have its own repercussions. In effect we have a contract to have a contract of arbitration.

The practical observations we made earlier have legal backing under Proclamation No 430/2005. Article 4(1) says:“To the extent that the proclamation conflicts with an obligation of the federal government under or arising out of an agreement with one or more other states or with an international organization, the provisions of that agreement shall prevail”.

The Proclamation seems cognizant of the importance of giving effect to terms of an international agreement one possible term being arbitration clause.

Art.9 of the FDRE constitution makes ratified treaties part of the legal system. Obligations undertaken by the federal government are nothing but treaties. As far as these obligations fulfill the requirements of Art.9 of the FDRE constitution, they form part of the legal system. As such anything embodied in such a treaty will have an overriding effect on the Civil Procedure Code. We have other possible mechanisms of enforcing arbitration clauses. Let us consider these mechanisms.

- (A) *The theory of severability*- the theory underscores the importance of separately treating arbitration clauses which are in administrative contracts. Accepting such theory helps us to allow the arbitration of administrative contracts.
- (B) *The maxim pacta sunt servanda*- once promise is given, the promise should bind the contracting parties. Courts should also uphold such a promise. Hence when a state agrees to submit the matter to arbitration, it waives its domestic laws which are against arbitration such as the Civil Procedure Code.
- (C) *Ratification*- the process of domesticating international law by parliament involves the tacit repeal of preexisting laws which are against the ratified treaty.

[An excerpt from: *Arbitrability in Ethiopia: Posing the Problem*
(Zekarias Keneaa, *Journal of Ethiopian Law* Vol .XVII, 1994)]

I. Introduction

Despite the advantage one can avail himself of by resorting to arbitration, not all disputes or quarrels, or even differences arising in peoples' relations can be submitted to the adjudication of parties' chosen experts. For different reasons, different states exclude disputes of certain categories from the ambit of arbitration. Hence, in every state, there would always be matters capable and permitted to be submitted to arbitration – arbitrable matters and there would, as well, always be matters regarded as not capable of being arbitrated – in arbitrable matters. Redfern and Hunter beautifully summarized it as quoted here below:

*The concept of arbitrability is in effect a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement is ineffective since it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought. (Allan Redfern and Mertin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell. London, 1986, p. 105).*

As inferable from the above quotation, which disputes may be submitted to arbitration (arbitrable) and which ones may not be submitted to arbitration (in arbitrable) is usually decided on by states and such decisions are expressed in national laws pertaining to arbitration. Because of diverse policy considerations, national interests and commercial realities, matters that are capable of being arbitrated in some states may constitute matters incapable of being arbitrated in other states. In other words, in some categories of disputes must, as a matter of public policy, be adjudicated by

state courts staffed by sovereign – appointed – judge and the submission of such matters to disputing parties’ – appointed private judges may be considered as illegal and the resultant award unenforceable.

In this work, an attempt is made to assess what is arbitrable and what is not in Ethiopia. The work does not exhaustively deal with the question. Far from it, all it does is, it tries to posse the problems that have occurred to the author’s mind related to arbitrability in Ethiopia. The endeavor, however, might hopefully assist future research to be conducted on the subject.

II. Arbitrability and Family Law

In Ethiopia there are no other substantive legal provisions, other than civil code articles 722, 724, 729 and 730 wherein it is clearly stated that it is only the court that is competent to decide on matters stated under those provisions. The message contained in the above – mentioned civil code articles may be put as: it is the court only the court, in exclusion of all other alternative dispute settlement mechanisms and tribunals, including arbitration, that can give decision on the issues of which squarely fall within the spirit of those provisions. In other words, matters falling within the limits and bounds of those provisions are not arbitrable.

Pursuant to Art 722 of the civil code, the issues of whether a betrothal has been celebrated or not and whether such a betrothal is valid, cannot possibly be submitted to arbitration because the very article makes the court the only competent organ to hear and give decisions on such matters. To put it otherwise, the phrase “only the court is competent” does away with the possibility of submission of matters the issue of which pertains to

the celebration of a betrothal or whether a betrothal is valid or not to private adjudication.

Similarly, in line with the provisions of Article 724 of the civil code, the possibility of submission of reference of suits the issues of which relate to the determination of whether or not a marriage has been contracted and whether such marriage is valid to arbitrators is prohibited and it is only the court that is recognized as competent to hear and decide on such matters. In a similar vein, in Art 730 of the civil code, the law has taken the stand that no other tribunal except the court is competent to decide whether an irregular union has been established between two persons. Unlike difficulties and/or disputes arising between spouses during the currency of their marriage or even the petitions for divorce whether made by both or one of the spouses, which have to compulsorily be submitted to arbitration, disputes arising out of irregular unions have to be submitted for resolution to the court and to no other tribunal.

In spite of the fact that pursuant to the mandatory provision of Article 725 – 728 of the civil code, despite, (difficulties) arising out of existing marriages, petition for divorce or even disputes arising out of divorces have to but compulsorily be submitted to arbitration: it is according to Article 729 of the civil code, only the court that is competent to decide whether a divorce has been pronounced or not. Article 729 of the civil code may be taken as having the message that the divorce decision made by family arbitrators have to be obligatorily be submitted to the court. The court, after having ascertained that family arbitrators have complied with the necessary legal requirements, and that the decision for divorce is rendered by a duly constituted panel of arbitrators, make its own decision that an enforceable decision of divorce has been pronounced. Though in line with the provision of Article 729 of the civil code the court seems to be making the latter decision on its own initiative, on the other hand, appeal

may also be lodged to the court to have the decision of arbitrators impugned on the ground of corruption of arbitrators or third parties fraud or the illegal or manifest unreasonableness of the decision made by arbitrators (Art. 736 of the civil code). Yet still, Article 729 also seems to be imparting the message that the court renders a kind of homologation and or certification service with respect to divorce decision given by family arbitrators. In other words, certifications that a married couple has been divorced or a marital union has been dissolved can only be given by the court and not by arbitral tribunal or the arbitrators that pronounced the divorce. The article seems to be imparting the latter message particularly when one considers the controlling Amharic version of Article 729 of the civil code. (Include the Amharic version here)

III. Matters Relating to Administrative Contracts Inarbitrable?

On the other hand, when one shifts from the substantive law over to the procedural one, one encounters Article 315(2) of the civil procedure code wherein it is clearly provided that only matters arising from Administrative Contracts and those prohibited by law are said to be Inarbitrable. Naturally, therefore, a question follows as to whether or not all other matters except those arising from Administrative Contracts and those prohibited by law could be regarded as arbitrable in Ethiopia, subject of course to the provisions of Articles 3325-3346 of the civil code. First of all it is surprising to find a provision that reads:

No Arbitration may take place in relation to Administrative Contracts as defined in Article 3132 of the civil code or in the other case where it is prohibited by law in the civil procedure code but nothing to that effect or even similar to that is stated in anyone of Articles 3325-3346 of the civil code.

As issue of interpretation or construction of the two legal texts i.e. Article 315(2) of the civil procedure code on the one hand and Articles 3325-3346 of the civil code on the other might as well arise. This becomes even more glaring as one considers the provisions of Article 315(4) of the civil procedure code which states that “Nothing in this chapter shall affect the provisions of Articles 3325-3346 of the civil code”.

If nothing in Book IV of the civil procedure code affects the provisions of Articles 3325-3346 of the civil code, and nothing as to whether or not matters arising from Administrative Contracts are Inarbitrable is mentioned in Articles 3325-3346, could Article 315(2) be given effect? In other words, if the overriding text of Articles 3325-3346 of the civil code are silent as to whether or not disputes emanating from Administrative Contracts are arbitrable; can't that be taken as an implication that even disputes from Administrative Contracts are arbitrable in so far as nothing express is stated in Articles 3325-3346 that they are not? Or should there be a manifest contradiction between the two codes' relevant texts for Articles 3325-3346 to be overriding?

In Water and Sewerage Vs Kundan Singh Construction Limited (High court, Civil file No 688/79) the court took a stand that Article 315(2) is a sufficient provision to exclude disputes relating to Administrative Contracts from the ambit of arbitrable matters. A close consideration of the main reasoning of the High Court to justify this stand, however, tells that the court based its reasoning on a point jurisdiction instead of taking Article 315(2) of the civil procedure code as a legal provision, sufficient on its face, to prohibit the submission of matters relating to Administrative Contracts to Arbitration. In the course of justifying its stand, the court said “question pertaining to which court or which tribunal has jurisdiction is a matter of procedure and that procedural matters are provided for in the code of civil procedure and not in the civil code”. The court, it may be said, endeavors

to use this line of argument in its attempt to defeat the strong point in Article 315(4) of the civil procedure code, i.e. that nothing in the chapter in which Article 315 of the code of the civil procedure is found shall affect the provisions of Articles 3325-3346 of the civil code. By so doing, the court rejected the argument raised by the defendant that Article 315(2) of the civil procedure code should not be given effect in the face of Articles 3325-3346 of the civil code wherein nothing is mentioned as to the inarbitrability of disputes arising from Administrative Contracts.

The other point the High Court raised to justify its ruling that matters related to Administrative Contracts are Inarbitrable was that the provisions of our civil code relating to Administrative Contracts were taken from French law. The court went further and stated that in French law there is a prohibition that disputes arising from Administrative Contracts should not be submitted to arbitration, and that such a prohibition is found in the French Code of Civil Procedure. Consequently, said the court, the prohibition in Article 315(2) is appropriate taking French law and the fact that provisions on Administrative Contracts in our civil code were taken from French law.

On the principle of interpretation that a latter law prevails over a preceding one it could be said that the civil procedure code which was promulgated in 1965 as opposed to the civil code which was promulgated in 1960, is overriding. This, point of interpretation was also raised by the court in the Kudan Singh case.

Would the approach of interpretation that follows the hierarchy of laws be of help in the context under consideration because of the fact that the seemingly contradictory legal provision appear in different types of legislations, i.e., Arts.3325-3346 in a proclamation, whereas, Art 15(2) of the civil procedure appears in an Imperial Decree?

IV. Other Substantive Law Provisions Indicative of Arbitration

Yet still, the main problem in relation to arbitrability in Ethiopia, however, seems to emanate from the confusion created by the Civil, Commercial and Maritime codes' express provisions for arbitration in certain respects and their silence otherwise. Family disputes arbitration dealt with in the civil code is, I think, a compulsory arbitration (Starting 1977, disputes between state – owned enterprises were also made as compulsorily arbitrable in Ethiopia by virtue of a directive No 2756/fe 1 ha/20 issued on Hamle 14, 1969 (July 21, 1977) by the then Prime Minister, Ato Hailu Yimenu.) rather than it is consensual. In other respects, the 1960 civil code for instance, expressly provides for arbitration under Articles 941, 945, 969(3), 1275, 1472ff, 1534(3), 1539, 1765, 2271 and is silent otherwise. (However, it is good to note that it is doubtful if Article 2271 of the civil code may be taken as a provision indicative of arbitration in the sense of Article 3325 of the same code. Where a seller and a buyer, refer the determination of a price to a third party arbitrator, it doesn't mean that the parties submit a dispute to be resolved. Unless the parties have unequivocally agreed that they will bound by it the "price" to be quoted by the "arbitrator", cannot be taken as binding as an award is in case of arbitration proper.)

The commercial code expressly provides for arbitration under Articles 267, 295 and 303 by way of reference to Articles 267, 500(1), 647(3), 1038, 1103(3) and the Maritime Code's only provision wherein it is expressly mentioned about arbitration in Article 209.

In the labor legislation we had for the last two decades, i.e. Proclamation 64 of 1975, the possibility of submission of a collective or individual trade dispute to arbitration was provided for in Article 101(1). In sub-article 3 of the same provision, arbitration, in fact, seems to have been envisaged as

obligatory with respect to disputes arising in undertakings which do not have trade dispute committee.

In the new Labor Proclamation, i.e. Proclamation No 42 of 1993, it is provided in Article 143 that “parties to a labor dispute may agree to submit their case to their own arbitrators...”

Now, therefore, it would be appropriate if one asks a question doesn't the fact of the existence of such express provisions for arbitration by the Codes mean that all other matters are Inarbitrable? What was it that necessitated express provision for arbitration in certain cases only? Was it just an endeavor to bring the possibility of arbitration to the attention of the parties concerned as an alternative dispute resolution mechanism or as an alternative to court action? Or was it meant to clear out the doubts from people's mind that disputes arising from those situations for which the codes mention arbitration may be submitted to arbitration although the Codes' provisions, including those mentioned under Article 3325-3346 of the civil code, do not mention what is not arbitrable as a matter of Ethiopian public policy except what is stated under Article 315(2) of the civil procedure code?

In some jurisdictions, there are well defined areas of matters which, as a matter of public policy, are designated as not arbitrable. For example, the German Civil Procedure Code Article 1025a provides: “An agreement to arbitrate disputes on the existence of contract referring to renting rooms is null and void. This does not apply when reference is made to section 556a paragraph 8 of the German Civil Code.” (Reproduced in Ottoatndt Glosner, Commercial Arbitration in the Federal Republic of Germany. Kluwer, 1984, p. 42.)

The French Civil Code Article 2060, on the other hand, provides: “One may not submit to arbitration questions relating to the civil status and capacity of persons or those relating to divorce or to judicial separation or disputes concerning public collectivities and public establishments and more generally in all areas which concern public policy.”

In Italy, parties may have arbitrators settle the disputes arising between them excepting those provided in the civil code Articles 409 i.e., those concerning labor disputes and those provided I Article 442 concerning disputes relating to social security and obligatory medical aid.

Some other jurisdictions have adopted different approaches from that of German and France. The Swedish Arbitration Act of 1929 (as amended and in force from January 1, 1984) for instance, provides in Section 1 that “Any question in the nature of civil matter which may be compromised by agreement, as well as any question of compensation for damage resulting from a crime, when a dispute has arisen with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators.”

The Swiss International Arbitration Convention of March 27/August 29, 1969, on the other hand, provides in article 5 that “the arbitration may relate to any right of which the parties may freely dispose unless the suit falls within the exclusive jurisdiction of state authority by virtue of a mandatory provisions of the law.”

Coming back to Ethiopian law, wherein we don’t have provisions limiting the kind of question that may or may not be submitted to arbitration except for what is stated under Article 315(2) of the civil procedure code, how should we go about deciding what’s arbitrable and what’s not? Especially, how should the approach taken by the codes to have here and there

provided for arbitrable matters be viewed? Can we argue a contrario that the rest, i.e. those numerous matters for which the codes do not expressly provide for the discretion to arbitrate, save of course those matters for which the civil code imposes obligatory arbitration, are Inarbitrable? Or can we by way of argument settle on the test of arbitrability that is close to the Swedish test that bases itself on the provisions of Article 3326(1) of our civil code and say “any matter which relates to any right which the parties can dispose of without consideration” is arbitrable in Ethiopia? This test becomes a fallacious on the moment one reads the provisions in sub-article 1 of Article 3327 that goes; “the provision of Art 3326 shall not apply where this code provides for arbitration.” It, therefore, follows that if the capacity to dispose of a right without consideration is not needed when the codes expressly provide for arbitration, the test that “any matter which relates to any right which the parties can dispose of without consideration is arbitrable in Ethiopia” fail to be an always working criterion.

Added to the above, the very approach taken by the legislator i.e. considering the situation where the codes provide for arbitration and where they don't, tells us that matters not expressly provided for in the codes may as well be made subjects of arbitral jurisdiction. The Swedish approach, therefore, doesn't, I think, work for the present Ethiopian reality and the test that's similar or identical to there's should be seen cautiously if not totally dismissed. The line of thought that pursues the idea that the matters not expressly provided for by the civil or other codes are inarbitrable also fails automatically because of the above mentioned argument. Hence, it could be said that the codes' express provision for arbitration here and there is meant to hint to the parties involved pertaining to matters provided for, that arbitration is an alternative to judicial proceedings or to encourage them to submit to arbitration.

Except for what is stated under Article 315(2) of the civil procedure code, the approach taken by the German, Italian and French arbitration laws also doesn't seem to fit in to the existing Ethiopian legal reality.

V. Arbitrability and the High Court's Exclusive Jurisdiction

The provisions of Article 25(2) of the civil procedure code may also be worth considering at this stage to see if there is in anyway the possibility of arguing that those matters provided for under Article 15(2) (a-i) could be taken as not arbitrable. One thing clear from Article 15(2) of the code is that the High Court, in exclusion of all other courts, shall have an initial material jurisdiction to try cases the matters of which emanate from those areas enumerated (a-i). Does this, however, mean that the exclusion applies to arbitration as well? If the extension is appropriate to speak in terms of tribunals does the exclusion apply to arbitral tribunal as well or is it limited to courts? Most important of all, could it be taken that those matters provided for under Article 15(2) of the code are meant to be inarbitrable?

Provisions of Article 15(2) of the code, coming under chapter 2 of the Book I of the code and dealing with material jurisdiction of courts, are meant to serve as a exception to the principle laid down under Article 12(1) as further expounded by the two articles immediately following and sub-article 1 of article 15.

Article 15(2) in other words, confers jurisdiction on the High Court irrespective of whether or not the amounts involved in the suits springing from matters listed (a-i) are worth either 5,000 Birr or below for suits not regarding immovable property or the amount involved is 10,000 Birr or less in a suit, for instance, relating to expropriation and collective exploitation of an immovable property.

The clear message in Article 15(2) is that the High Court has jurisdiction to try cases involving matters listed (a-i) by virtue of the law itself ousting the material jurisdiction of the Awraja and Woreda Courts. The clarity of the message of the article, however, doesn't seem to have ready answer to queries like: What if the parties to a contract or even to a dispute agree to oust the jurisdiction of the High Court by considering to submit their future or existing disputes in relation to those matters mentioned under Article 15(2) to arbitration? Should such an agreement be regarded as illegal or unenforceable? If parties knowingly or unknowingly agree to submit an existing or future dispute emanating from one of those areas mentioned under Article 15(2) to arbitration, and there arises some sort of disagreement as to the formation of the tribunal: should the court whose assistance is sought in appointing an arbitrator decline to do that on the strength of the provisions of Article 15(2) of the code? What about a tribunal duly constituted either by the parties themselves or through the assistance of the court, should it decline jurisdiction in favor of the High Court or should it assume jurisdiction, proceed and give an award? At the enforcement stage, would such an award be recognized and be given effect by the court to which an enforcement application is filed? These and other related questions may be raised in relation to Article 15(2) of the code and arbitrability.

Would figuring out the rationale behind the giving of exclusive jurisdiction of the High Court regarding suits springing from those matters provided for under Article 15(2) (a-i) be an answer to the questions raised above? Could the purpose behind Article 15(2) be the public policy to make sure that the matters provided for in that sub-article are tackled by the court of high position that is staffed with high trained and or experienced judges? Or could the purpose be more serious than that? Was the intention behind the conferring of exclusive jurisdiction on the High Court in suits regarding

those areas to single out certain areas of importance in Commercial and Maritime relations and other sensitive areas, to give emphasis to some and to thereby ensure certainty in the way of interpretation of the laws involving those areas which in turn would help develop the jurisprudence of the laws in those area?

The rationale behind Article 15(2) may be to facilitate trials of the suit arising from those matters by (highly) trained and experienced judges, or judges that have specialized in dealing with those matters. If that is the case, the submission to arbitration of disputes emanating from those matters might have not been intended to be excluded altogether because in the modern world arbitration are, generally, qualified enough to deal with all sorts of complicated matters. Incidentally, the provision o the civil code Article 3325(1) makes it clear the arbitrators “under take to settle disputes in accordance with the principles of law.” And if arbitrators have to resolve disputes in accordance with the principles of law, then it follows that arbitrators should, of necessity, be legal professionals of some sort whether trained or those who have managed to acquire the expertise through practice and /or experience.

On the other hand, if the intention behind Article 15(2) was to ensure certainty and, may be, predictability in the way in which the areas of law dealing with those matters are interpreted, then the argument that those matters provided for under Article 15(2) may not be submitted to arbitration could, generally speaking, hold true. Nevertheless, even if the disputes arising from those matters are submitted to arbitration, in certain respects, it could be argued that it doesn't make a glaring difference because Ethiopian arbitrators are appointed to resolve disputes according to principles of law anyways. It should, however, be noted that in accordance with the provisions of Article 317(@) of the civil procedure code, arbitrators may, where the parties at dispute have agreed to that effect,

decide with out giving regard to the “principle of law”. The authorization given to arbitrators by disputing parties to decide with out being bound by the strict application of the law is referred as to amiable composition or ex aequo et bono. The arbitrator(s) who is (are) authorized to proceed in amiable composition is (are) called amiable compositeur(s).

If parties in their agreement to arbitrate existing or future disputes empower their arbitrator to proceed as an amiable compositeur, that would be tantamount to ousting the provisions of Article 15(2) of the civil procedure code, unless it is arguable that parties can not contract out the exclusive jurisdictional power of the High Court vested in it by virtue of the said provision. Unless the existence of Article 15(2) is taken as a prohibition (to meet the requirement of the last part of Article 315(2) of the same code), not to submit to arbitration disputes emanating from any one of those areas, there is no convincing reason, I would say, why parties can not submit disputes of at least some of those matters to arbitration.

Off hand, what is it, for instance, that prohibits the submission of disputes arising from insurance policies (Article 15(2) (c) of the code to arbitration? I wonder if there is any public policy reason that precludes insurance disputes from being submitted to arbitration. If the provision of Article 15(2) (c) of the code is to be construed as showing the inarbitrability of insurance disputes, then those arbitration clause in a number of standard policies that have been in use and currently in use by the Ethiopian insurance corporations are to be taken as contrary to the spirit of the above-mentioned provision, and hence are not to be given effect. The clauses may, as well, be taken as an evidence showing circumstances of opting out the application of Article 15(2) (c) by parties to insurance contracts, thereby waiving their right to initially submit their disputes to the High Court and only to it. True, the legislator might have had it in mind that consumers (insurance policy holders) and insurers usually are unequal

parties and hence might have thought that policy holders need to be given the backing of state courts, in fact that of the High Court right from the initiation stage of their cases.

One also wonders if there is a public policy reason why suits relating to the formation, dissolution, and liquidation of bodies corporate (Article 15(2) (a) of the code cannot be submitted to arbitral jurisdiction.) Could the legislative worry that triggered this specific provision be the protection of interests of individual third parties so that there won't be miscarriage of justice when arbitrating disputes between giant big business monopolies or trust and individuals? If that is the case, does it imply that third parties interests cannot be protected through arbitral adjudications? Or is it because formation, dissolution and liquidation of bodies corporate could as well be applicable to the so called "administrative bodies" which category includes the "State, Territorial subdivision of the state, Ministries and Public Administrative Authorities?" (Article 394-397 of the civil code) Though it may be understandable why suits pertaining to the state, its territorial subdivisions, Ministries and Public Administrative Authorities may not be arbitrable; one, but, can't help wondering why suits regarding the formation, dissolution and liquidation of bodies corporate, for instance associations, may not be submitted to arbitration.

*As mention has been already made, French law prohibits arbitration in a number of specific areas among which "disputes concerning public collectivities and public enterprises" constitute one category. Mr. Charbonneau is of the opinion that it should be emphasized that disputes falling in the latter category "in which arbitration agreements are prohibited has been interpreted to entail lack of capacity of the state and its entities to arbitrate disputes in which they are involved. (T. E. Charbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration*, *Tulane Law Review*, 1980, p. 9).*

It is also true that in many countries matters relating to patents and trade marks are excluded from being arbitrable (Rene David, Arbitration in International Trade, 1985, p. 188). Bankruptcy is also regarded not arbitrable matter in quite a number of states. But I wonder if Article 15(2) (b) and (d) of the code were formulated with the objective excluding those matters from the purview of arbitrability.

It is difficult to understand why maritime disputes or suits arising from negotiable instruments are put out of arbitral adjudication. If Article 15(2) of the code in general, and Article 15(2) (b) in particular is to be construed as indicating inarbitrable matters, I wonder as to what construction should be given to Article 209 of the Maritime Code where it is stated that parties to the Bills of Lading may insert arbitration clauses and hence agree to adjudicate their future disputes by way of arbitration as long as they (parties) do not, give power of amiable composition to the arbitrator. In England, maritime arbitration is a very specialized arbitration and for that matter Londoners have a kind of specialized association, the London Maritime Arbitration Association (LMAA) just to arbitrate maritime disputes.

When one thinks of disputes relating to or arising out of negotiable instruments, one necessarily wonders why such disputes or matters pertaining to negotiable instruments cannot be submitted to arbitration. Starting from the Geneva Protocol of 1923, arbitrable matters (at least for international arbitration) were formulated as limited to "...Commercial matters or to any other matter capable to settlement by arbitration." If this is the yardstick, there seems to be no reason, why disputes relating to negotiable instruments cannot be arbitrable. After all, negotiable instruments are, typically, commercial in their very nature. Or if according to Article 715(2) of the Commercial Code some negotiable instruments fail

to qualify to be in the category of “Commercial” like, “documents of title to goods” or “transferable securities”, could it be argued that the latter two categories of negotiable instruments are not “Commercial” in their very nature? I personally doubt. True, “transferable securities” or “documents of title to goods”, do not, as such, carry “unconditional order(s) or promise(s) to pay a sum certain in money”, a typical characteristics of Commercial negotiable instruments under Ethiopian law (Articles 732, 735, 823, 827 of the commercial code). Minus the requirement of carrying unconditional order(s) or promise(s), however transferable securities are generally understood as “evidence of obligation to pay money or of rights to participate in earnings and distribution of corporate, trust and other property are mere choses in action. Nevertheless, in modern commercial intercourse, they are sold, purchased, delivered and dealt with the same way as tangible commodities and other ordinary articles of commerce...” Being evidence of debt, of indebtedness or of property, transferable securities usually include bonds, stock (share) certificates, debentures and the like. In other literatures dealing with negotiable instruments, it is good to note that the term “securities” is usually preceded by “instrument” and documents known as “transferable securities” in our commercial code are transferable to as “Investment securities”.

“Documents of title to goods” from legal point of view, though they may as well have other meanings, may be generalized as written evidences that enable the consignee to dispose of goods by endorsement and delivery of the document of title which relates to the goods while the goods are still in the custody of the carrier or in transit. Documents of title to goods may as well be evidences as to the title of the person claiming the status of a consignee of the goods.

The generic expression of documents of title to goods in modern business includes Bills of Lading, Airway and Railway Bills, depending on whether

goods represented by the document on title are carried by sea, air or by rail.

In so far as documents of title to goods are very much related to international sale, purchase and carriage of goods, it is hard for one to categorize such documents as falling outside the purview of commercial transactions and/or relationships. As transferable securities and documents of title goods, the other two categories of negotiable instruments given recognition by the Ethiopian Commercial Code, are not, function wise, away from business activities, there seems to be no reason why disputes arising from or suits relating to negotiable instruments irrespective of whether the instruments fall in the category of commercial, transferable securities or documents of title to goods may not be submitted to arbitration.

What about those matters stated under Article 15(2) (e) and (f) of the code? Should matters that pertain to “expropriation and collective exploitation of property” be excluded from being seen as matters capable of being arbitrated in Ethiopia? In as far as expropriation results from an act of a competent public authority, and in as much as an “authority” is to be taken as “administrative body”

There may be the possibility of arguing that matters relating to expropriation are inarbitrable. The private person whose interest is affected by expropriation, it seems, may apply to a competent court of law where he/she thinks is expropriated outside the spirit of the relevant constitutional provisions, if any, or without due process of law. Otherwise, disputes arising out of a competent authority’s appropriate decision to expropriate and the dispute (agreement) ensuing because of resistance of the interested owner to such a decision, cannot be submitted to arbitration on the ground of sovereign immunity. Nevertheless, it is worthwhile to note that though disagreements relating to expropriation per se are inarbitrable,

matters of compensation due by expropriating authority to the owner of an expropriated immovable and possibly the claims of third parties against the expropriating authority may be submitted to arbitration (Article 1467(3) cum 1472ff).

What about disputes pertaining to “collective exploitation of property”? Would there be a valid public policy reason why such disputes may be regarded as inarbitrable? Why should, in particular, disputes arising from collective exploitation be termed to be inarbitrable where all the parties concerned have freely consented to arbitrate? One possible reason why such disputes may be seen as inarbitrable might be because of the plurality of the parties involved, lest it might be difficult to justifiably safeguard the interests of all of them. Imaginably, the interests of the pluri-parties concerned could be quite complicated and such multiple interests and the ensuing complication it creates may, as well, constitute sufficient public policy reason not to submit such dispute to arbitration. Moreover, an arbitral tribunal generally doesn’t have the power to order the consolidation of actions by all parties involved even if this would seem to be necessary or desirable in the interests of justice.

With respect to suits relating to “the Liability of public servants for acts done in discharge of official duties” (Art 15(2) (f) of the code), it would be argued that the exclusion of such suits from the ambit of arbitrable matters may be justifiable based on the widely known reasoning of sovereign immunity again. Under Art 2126 of the civil code, (It is worth to note that arbitration, save in situations it is imposed by law, arises from contract. Doubt may, therefore, be expressed whether tort cases are, generally, arbitrable. As to the non arbitrability of suits arising from contracts to which the state or its territorial sub-division is a party, and may be the liability of officials involved in state contracts, Art 315(20 of the civil procedure code is the only authority available.) whose title reads: “Liability

of the State” particularly in the second sub-article, it is provided “Where the fault is an official fault the victim may also claim to be compensated by the state, which may subsequently recover from the public servant or employee at fault.”

The above quoted provision shows that the state, almost certainly, becomes a party to literally all suits instituted on the basis of this provision (the state, it is submitted, is presumed to be financially better off than the official, employee, or public servant that causes the damage by his fault.). Article 2128 further states that the provisions of the two immediately preceding articles apply to the liability of public servants or employees of a territorial sub-division of the state or of public service with legal status (Art 394ff of the civil code).

Those suits emanating from sub-sub-articles (g) nationality; (h) filiation and (i) habeas corpus of Art 15(2) of the code may be said, fall outside the purview of arbitrable matters. Suits relating to these matters are instituted based on specific legal provision(s) and usually for the personal protection and interests of the person(s) filing them. The state and the public at large would, normally, have interests in the final outcome of cases pertaining to these matters as well. Nationality “represents a man’s political status by virtue of which he owes allegiance to some particular country.” This, without more, can be taken as indicative of the interests of the state in nationality suits and which may constitute a sufficient public policy reason why nationality suits should not be submitted to private adjudication.

As to filiation, which is “primarily the relation of parent and child,” it would, I think, be possible to argue that such suits (filiation suits) are inarbitrable. The society would definitely be interested in the final outcome of filiation cases, and the law wouldn’t want, as far as practicable, that children be left without fathers or mothers. From family matters, filiation

seems to be the only aspect that may have been envisaged as inarbitrable, for other family disputes particularly divorce cases and those related ones are compulsorily arbitrable in Ethiopia. (Art 725-737 of the civil code).

Generally, matters relating to status, like filiation, nationality, etc. are regarded as inarbitrable. Family disputes are not regarded as arbitrable in quite a number of jurisdictions, and ours in that respect is an exception that came about, presumably, because of tradition.

Suits (actions) relating to habeas corpus, for sure, can't be arbitrable. Robert Allen Sedler, based on Article 177 of the civil procedure code argues that, habeas corpus suits are actions for a writ "usually sought by persons in custody on a charge of having committed a penal offence, and that the action to obtain the writ is considered a civil action". Often it is expected that the official to whom the writ is addressed might refuse to obey to "bring the body" to court and it is in that respect that the compelling power of the High Court for the public official in question comes in to play. So, it may be said that it is understandable if actions for suits of habeas corpus are said to fall outside arbitrable matters.

VI. Arbitrability and Objects of a valid Contract

Finally, in the absence of provisions supplying us with adequate guidelines of arbitrability in Ethiopia, we would, I think, make some further interpretational endeavors. Except for the provisions of Article 315(2) of the civil procedure code and in situations where the law provides for a compulsory one, arbitration arises from contracts whether it is an agreement to submit existing or future disputes to private adjudication. If arbitration emanates from contracts, it is, by virtue of Article 1676 of the civil code, subjected to the general provisions of contract i.e., Article 1675-2026 of the civil code and without prejudice to the application of the special provisions of Arts 3325-3346 of the same code and probably Arts

315-319 and 461 of the civil procedure code. If arbitration is subject to the general provision of contracts, then the requirements laid down under the provisions of Art 1678 viz:

No valid contract shall exist unless:

- a. The parties are capable of contracting and give their consent sustainable at law;*
- b. The object of the contract is sufficiently defined and is possible and lawful;*
- c. The contract is made in the form prescribed by law, if any apply to arbitration. From among those elements mentioned under Article 1678, the requirement that the object of a contract must be sufficiently defined, must be possible and lawful for it to validly exist in the eyes of the law, are quite pertinent to the subject of arbitrability. It may be debatable whether those three strict requirements do squarely apply to the arbitration agreement per se. Nevertheless, they definitely do apply to the underlying contract for the enforcement, variation, or interpretation of which parties agree to submit their disputes to arbitration. It could, therefore, at least be said that disputes arising from illegal or immoral underlying contracts cannot be arbitrable.*

*(An excerpt from Particular Features of Contracts. Michael Gunta
Ethiopian Bar Review, Vol.1 No.1, 2006. Translation mine)*

The claim of the contractor with regard to anything is to be addressed by the consultant. Any decision made in this order is subject to arbitration (Art.67, FIDIC Contract).

There is no doubt that arbitration is a better option to solve construction disputes. Even arbitration is not a first hand option given the time it takes and the cost it has. International arbitration takes three to five years and when appeal is lodged it will take a minimum of two years. Execution of decision and the consequent process of execution may take another two years, the time between initiation and decision will be seven years. The cost of proceeding which includes the one paid to lawyers and arbitrators and the cost of transportation and accommodation is another burden especially for those who await payment in the meantime. Domestic arbitration is not different from this.

In England, after an intensive study of the matter and the subsequent shocking result, the country has embarked upon different courses of actions. Among the actions taken, legislating laws which will highly assist the construction industry was one. The Housing Grants, Construction and Regeneration Act 1996 came up with a new dispute settlement mechanism called "Adjudication". Parties to a construction contract have a right to submit a dispute to the adjudicator. The manner of selecting the adjudicator and the time to be taken to adjudicate a given case is fixed by the Act. Accordingly the adjudicator shall decide a dispute presented to him/her within twenty eight days. This might be extended by the agreement of both parties. The decision of the adjudicator is subject to review by a court. However until the decision is reversed by a court of law, the decision of the adjudicator will be effective.

To avoid construction disputes, the system in the United States came up with a system of "Dispute Review". Under this system, the contractor and the owner of the work will elect a person who will examine the dispute and come up with a recommendation. This person is called Dispute Review Expert.

Summary

Alternative Dispute Resolution mechanisms are upheld for their efficiency and other substantive merits than litigation.

Most international systems accept the subjection of administrative contracts to arbitration.

In Ethiopia we have different provisions that try to regulate the issue but with a substantive confusion they inject in the system.

Because no clear cut solution is provided in the law, it was important to consider the merits of ADR in the chapter. Accordingly we saw the different advantages of ADR and the relevance it has to administrative contracts.

The indigenous nature of ADR to Ethiopia and the especial advantages it provides was also discussed.